LIBRARY OF
STATE SERVICES ORGANIZATION

THE Public Interest

1986

NUMBER 85, FALL 1986, PRICE: $4.50

Housing and the Homeless

Thomas J. Main on Homeless Families

Peter D. Salins on the Permanent Housing Problem

W. Robert Curtis on "Deinstitutionalization"

Irving H. Welfeld on Our Graying Suburbs

Cleaning Up Superfund — *Marc Landy*

Supporting the Arts—Whose Responsibility? — *Winthrop Knowlton*

Sex and the Conservative Body — *Mark Lilla*

Fall Books — *Reviewed by Abigail M. Thernstrom, James D. Koerner, Andy Stark, R. Shep Melnick, Jeremy Rabkin, Michael S. Teitelbaum, and Michael S. Greve*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE Public Interest

NUMBER 85, FALL 1986

CONTENTS

Housing and the Homeless

The Homeless Families of New York	*Thomas J. Main*	3
Toward a Permanent Housing Problem	*Peter D. Salins*	22
The Deinstitutionalization Story	*W. Robert Curtis*	34
Our Graying Suburbs: Solving an Unusual Housing Problem	*Irving H. Welfeld*	50
Cleaning Up Superfund	*Marc Landy*	58
Supporting the Arts—Whose Responsibility?	*Winthrop Knowlton*	72
Review Essay: Sex and the Conservative Body	*Mark Lilla*	86
Fall Books Supplement	*Contents*	95
Controversy: Are Teachers Underpaid?	*Albert Shanker/ Myron Lieberman*	136
Contributors		144

THE PUBLIC INTEREST (ISSN-0033-3557) is published quarterly by National Affairs, Inc. and appears in Spring, Summer, Fall, and Winter issues. Its office of publication is located at 10 East 53rd Street, New York, NY 10022. Subscription price: $18.00 for one year; $36.00 for two years. Add $2.00 annually for Canadian and foreign subscriptions. Unsolicited material cannot be returned unless accompanied by sufficient return postage. Second class postage is paid at New York, and at additional mailing offices. © 1986 by National Affairs, Inc. Postmaster: Please send all changes of address to: Public Interest Subscription Dept., 20th and Northampton Streets, Easton, PA 18042.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Editors
Irving Kristol and Nathan Glazer

Publisher
Warren Demian Manshel

Publication Committee
Martin Feldstein
Harry Kahn
H. J. Kaplan
Glenn C. Loury
Harry McPherson
Daniel P. Moynihan
Leo Rosten
Martin E. Segal
Stanley Simon
Arthur L. Singer, Jr.
Roger Starr
Paul H. Weaver
James Q. Wilson

Managing Editor
Daniel Casse

Assistant Managing Editor
Peter McFadden

Assistant Editor
Thomas Donatelli

Assistant to the Editors
Rita Lazzaro

Associate Editor
Mark Lilla

Consulting Editor
Michael Andrew Scully

Editorial Office
10 E. 53rd St., New York, NY 10022

Subscription Department
The Public Interest
20th & Northampton Sts.
Easton, PA 18042

Newsstand Distributor
Bernhard DeBoer, Inc.
113 E. Centre St., Nutley, NJ 07110

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The homeless families of New York

THOMAS J. MAIN

WE NOW KNOW that there are different kinds of homeless individuals: street people (both men and women); the mentally ill; the otherwise disabled; battered wives; runaway children; and so on. But homeless families are a relatively new phenomenon. While homeless individuals, especially the deinstitutionalized and mentally ill, have been the subject of public and scholarly notice since the early 1970s, little research has been done on homeless families. Indeed, even such essential facts as the number and origin of homeless families are not widely known. The information that has been available is often limited and contradictory. This article will attempt to clarify the basic facts surrounding homeless families in order to evaluate the problem and assess the current shelter policy designed to cope with it. This discussion will deal primarily with New York City, since that is where most of the available hard data come from.

The numbers game

Until recently, most homeless families in New York City were put up in hotels. But it is not clear just how many such families there

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

were and where they stayed. According to one document: "New York City has been using hotels to house its homeless families for many years. Throughout the 1970s and the early 1980s the caseload remained somewhat constant at approximately 600 families. In addition, some 340 families have been housed in family centers which are operated by nonprofit corporations or the city itself for the sole purpose of providing shelter and services to homeless families."[1] Other documents, however, conflict with this account. An unattributed document provided by the Human Resources Administration (HRA) contains a table entitled "Families in Temporary Housing 1971-1976." This table indicates that the number of shelter families peaked at 1,346 in March 1971. By December of that year the number had dropped to 299.[2] The low point of 264 homeless families in shelters between the years 1971 and 1976 was reached in July 1972. But the numbers continued to rise and fall and by December 1976 there were 633 shelter families. (For some reason, no complete figures are available from 1976 to 1982.) Thus, according to this document, the number of families given shelter in hotels never rose above 1,346 or fell below 264 from 1971 to 1976.

In the 1980s the numbers began to grow. As of 1984 there were 2,354 homeless families in New York's hotels and shelters, which marked a 51 percent increase over January 1983 and a 148 percent increase over July 1982. By November 1985, there were 3,960 families for a total of 14,612 individuals in the system. The latest figure as of September 1986 is 4,365 families or about 15,000 individuals.[3]

There has also been an explosion in the number of facilities the city uses to shelter homeless families. In July 1982 only a few hotels were used to shelter homeless families, yet by December 1983 more than fifty hotels were being used on a regular basis and the city opened a congregate or barracks shelter as well. The city now has sixty-five facilities to house the homeless, including hotels and motels as well as city-run shelters. Homeless families have clearly become a bigger, more widespread, and visible problem within a very short period of time.

In order to understand these numbers, one must understand how the shelter and hotel system is run. Any family that finds itself without shelter can report to a local welfare office (or "Income

[1] "A Comprehensive Plan for the Temporary and Permanent Needs of Homeless Families in New York City," Human Resources Administration, New York City, January 10, 1984.

[2] The reasons for this dramatic shift in numbers will be discussed later. For a more complete account see Robert Jorgen, "Progress Report March 15, 1971–December 31, 1971," Family Hotel Relocation Program, December 31, 1971.

[3] Figure reported by the Human Resources Administration.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Maintenance Center," as they are called by New York City's HRA) and ask for a place to stay. If it is after hours the family can report to an "Emergency Assistance Unit" (EAU), open twenty-four hours a day, seven days a week, in all boroughs except Staten Island. The Manhattan EAU is the largest. Families must wait in an EAU until an opening in some shelter or hotel becomes available. This wait can sometimes be a long one and a family may spend an entire night in an EAU before a space opens up, but city policy is to provide everyone a space who requests it as soon as possible. No one is turned away. Of the three types of shelters, hotels house 80 percent of the families and family centers and barracks shelters (that is, family shelters without private rooms) about 10 percent each. Costs for sheltering such families are high: hotels and family shelters cost $49 per night for a family of four, while barracks shelters cost a startling $168 per night.[4] The average length of stay in all facilities is 12.16 months.[5]

Just what has caused this relatively recent explosion of homeless families? No one knows for sure, but there are at least three places we can look to in order to get some explanation of just how this happened: New York City's housing market, the nature of the clients themselves, and the city's shelter policy. We will look at all three of these areas and then make a tentative suggestion about what might be causing the problem.

A housing problem?

All New Yorkers, but especially the poor, face an extremely tight housing market. In 1984 (the last year for which figures are available), the net vacancy rate for all New York City was 2.04 percent, down from 2.13 percent in 1981 according to "Housing in New York: Study of a City 1984," a report prepared for the Department of Housing Preservation and Development by Michael A. Stegman. Further, the monthly welfare rent allowance for a family of four is $270 and the vacancy rate for apartments in this price range ($250-299) was 2.18 percent. Apartments renting for under $200 a month, with a vacancy rate of 0.37, were nearly impossible to find.

Other statistics in Stegman's report also point to the difficulty the poor have in finding a suitable apartment. Between 1981 and 1984, the number of units renting under $200 a month dropped from 437,000 to 265,000. Partly as a result of this decline in supply,

[4] Cited by Committee for New York's Future based on an interview with Suzanne Trazoff, spokesman for Human Resources Administration, May 5, 1986.

[5] Cited by Committee for New York's Future from Human Resources Administration Crisis Intervention Services, *Monthly Report*, February 1986, p. 7.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

median gross rent has gone up from $265 in 1981 to $330 in 1984. Overcrowding has also gone up: using the traditional measure of overcrowding—more than one person per room—144,000 or 7.7 percent of all renters in New York lived in overcrowded conditions. Stegman writes:

> Significantly, the crowding rate has increased for the first time in nearly 25 years. According to the 1984 Housing and Vacancy Survey, a higher percentage of New York (2.4 percent or 45,000 households) lived in seriously overcrowded conditions—which is defined as more than 1.5 persons per room—than at any time since 1970.

Is homelessness in New York City, then, simply caused by a lack of affordable housing? Undoubtedly the city's housing problems have contributed to the problem of homelessness, but whether they are the sole cause of homelessness among families seems doubtful.

Consider, for example, the evidence from falling vacancy rates. Between the time when homelessness first began to attract attention and 1984, vacancy rates did fall, from 2.95 percent to 2.04 percent. But at other times in the city's past the vacancy rates have dropped more sharply. For example, in 1965 the vacancy rate for New York City was 3.19 percent; by 1970 this had plunged to 1.5 percent. The average daily census at New York City public lodging facilities for individuals indicates that the number of residents in the city shelter system stayed fairly constant over a long period at slightly above 2,000.[6] In 1971, as we pointed out earlier, at the peak of the city's housing shortage, a total of 1,346 families were maintained in welfare hotels compared to the over 4,000 families who are in hotels and shelters today when the vacancy rate is even higher than it was in 1971. Moreover, the overcrowding rate has also decreased, from 10.5 in 1970 to 7.7 in 1984.

It is hard to see from these figures how the changes in housing conditions could have caused massive homelessness among families. If a housing crisis is what causes families to be without homes, then why didn't we have a homeless family crisis of the size we do now back in 1971?

In fact, we did have what was then perceived to be a homeless family problem in 1971. The figure of 1,346 families in city-placed welfare hotels in March of that year was considered a dramatic emergency and considerable efforts were devoted to relocation. And indeed it did prove possible then to relocate homeless families into inexpensive apartments, and the number of families placed by the city in welfare hotels dropped dramatically to 299 by December

[6] "New York City Plan for Homeless Adults," James A. Krauskopf, Human Resources Administration, New York City, April 1984.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

1971. Similar recent relocation efforts have proven unsuccessful, which may indicate that despite the lower vacancy rate, more housing at the lower end of the market was then available (there were certainly more single-room occupancies, but SROs are occupied for the most part by individuals). In all likelihood, the citywide vacancy rate is not a good indicator of that part of the housing market that is most likely to serve as an alternative to the streets for potentially homeless families. We need further research to determine not what was happening with the overall vacancy rate during this time, but with the supply of housing affordable to potentially homeless families. Such work might entirely clear up the anomalies pointed out here. But it is far from clear that "the housing crisis" by itself has caused the recent upsurge in family homelessness. The housing crisis, rather, seems to be a necessary but not sufficient condition for bringing on the kind of problems we see now.

What kind of families?

We do know something about the demographic characteristics of homeless families, at least in New York. The HRA's Office of Program Evaluation conducted a study of 196 homeless families at seven New York City welfare hotels and family centers. These families were interviewed during March and April 1984 and tracked over a six-month period. The findings were issued as a series of "Project Bulletins." According to one such bulletin ("Project Bulletin: Longitudinal Study of Homeless Families: Preliminary Findings," Human Resources Administration, PB-#1, January 1985), "the homeless family can best be characterized as headed by a single, unemployed female in her late twenties or early thirties who dropped out of high school and who has two or three children. The majority of families are black (67 percent) or Hispanic."

The average family includes three children and one adult with median ages of six and twenty-seven respectively. Mothers had their children young, with about 36 percent of the families having the first child while the mother was under eighteen. Virtually all the families were on public assistance before they became homeless, with 57 percent having been public assistance recipients for more than five years. Interestingly, 87 percent of the families have close relatives—parents, siblings, cousins, friends and boyfriends—in New York City. According to the project bulletin, however, "the families visit or call them monthly, but receive little financial support from them because relatives are often unable to provide money or shelter."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Where were these homeless families before they came to the shelters and what drove them out? This is a key question for policy toward the homeless since if the families have left unbearable situations the city has little choice but to put them up as long as is necessary. On the other hand, if it is humanly possible to encourage families to stay where they are or return whence they came, this would obviously be more desirable. A study conducted in 1984 by the HRA (Table I) gives the breakdown on the origins of homeless families.

Table I. Reasons for Seeking Shelter According to *Project Bulletin* PB-#85-9[a]

Reason for Leaving	*Percentage*
Fire or Other Disaster	27.8%
Vacate Order	10.8%
Dangerous Housing	17.0%
Forced Out by Primary Tenant	20.6%
Eviction for Nonpayment	20.1%

[a] Source: "Project Bulletin: Longitudinal Study of Homeless Families: Return to Permanent Housing," Human Resources Administration, PB-#85-9, December 1985. Percentages do not add to 100 percent because some families infrequently cited other reasons for seeking shelter such as domestic violence, vandalism, crime, overcrowding, or recent arrival in New York City. Some families provided more than one reason.

This table seems to suggest that at least 44 percent (the sum of "Fire or other Disaster" and "Dangerous Housing") of homeless families were forced into the system by physical necessity.

But another attempt to determine the origins of homeless families based on a total of 1,221 families (all the families that were referred to HRA for temporary housing between October and December 1983) gives rather different figures:

Table II. Reasons for Seeking Shelter According to "A Comprehensive Plan"[a]

Reason for Leaving	*Number*	*Percentage*
Nonpayment of Rent	292	24%
Eviction by Primary Tenant	696	57%
Disaster	64	5%
Referred by Other Agency	31	3%
Moved from out of New York City	36	3%
Battered Women	35	3%
Other	67	5%

[a] *Source:* "A Comprehensive Plan for the Temporary and Permanent Needs of Homeless Families in New York," January 10, 1984, Appendix C.

According to this second set of figures, only 5 percent of homeless families (i.e., those under the category 'Disaster') were pushed

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

out of their former lodgings by physical necessity. And an extraordinary 57 percent of those families in the system already had a place to stay—albeit with someone else—before coming to the shelter system. Here we receive the impression that the problem of homelessness for the majority of families is one of somehow holding onto the places they already occupy.

But there are differences in what these two sets of figures are trying to get at. According to Steven L. Taylor, the Deputy Administrator for Policy and Program Development at HRA who developed the first set of figures, the 20.6 percent of homeless families who were forced out by a primary tenant were placed in this category only if the evicted family had been living with the primary tenant *for at least three months*. The idea was to count a family as being evicted by a primary tenant only if that arrangement had been semipermanent. On the other hand, the figures reported in the second study appear (the text is not specific on this point) to refer to where the homeless family was immediately before it arrived in the shelter, regardless of how long it had been there.

There are sound reasons for both approaches. If a family loses its home through some sort of a disaster—a burnout, say—and then moves in with relatives for a few days on an emergency basis and, when that arrangement becomes too tense, moves into the shelter system, should not the case be counted as a family that lost its housing through disaster?

On the other hand, the fact that 57 percent of the families come into the system directly from living with another family, and that only 5 percent have been forced out directly by physical necessity tells us something too: Even after a disaster, the majority of homeless families do have access to some other housing before entering the system. The choice the majority of these families face is *not* between the streets and the shelter system—a situation that can be proven by the readily observable fact that there are virtually no homeless families on the streets of New York City.

There is no question that the city must provide temporary shelter for victims of burnouts and collapsed buildings. But in the majority of cases the city is putting up people who already have a place to stay. The function of the system for this majority seems not to be the protection of women and children from the elements, but relief from a tense or uncomfortable situation of doubled-up families.

Perhaps "tense or uncomfortable" is too benign a description of life for doubled-up families. Perhaps moving such families into the shelters and hotels is a legitimate function of the system. But consider some implications of this assumption. The New York City

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Housing Authority estimates that at least thirty-five thousand families are living doubled-up illegally in public housing. Some nonprofit groups estimate that tens of thousands of other poor families are living doubled-up in private housing. Is the city system supposed to be prepared to absorb such numbers and to improve conditions in the system to boot? If so, someone will have to come up with a lot of money. The cost of sheltering a family of four in a barracks-like shelter in the Bronx is nearly $6,000 a month, or $70,560 a year.[7] One might argue that such costs could be reduced, but it is not clear if they can. For example, the approximately $70,000 figure for the barracks shelter derives from the high level of services provided by the city. In the Roberto Clemente barracks-like shelter, the cost of putting up a family is $4,920 a month, half of which goes for salaries and benefits of eighty-two HRA staff members, including twenty-five social workers and housekeepers. Still more goes to provide such supplies as bed linen, toiletries, and meals at the shelters' on-site cafeteria. The rest is spent on other workers, including twenty-four-hour guards and providers of health care. No one is talking about cutting back on these services. Indeed, homeless advocates insist on dramatic improvements in facilities and service. But if costs are so high and a large part of the potential population is already housed elsewhere it would seem elementary prudence to encourage anyone who has a viable apartment—whether doubled-up or not—to stay there. Of course, this does not mean that doubling up is a good thing or that we should permanently tolerate it, but we cannot solve the problem through shelters. The solution should come from a revival of the city's low-income housing market. And until such a revival takes place we are faced with a difficult choice: Either allow the shelter system to be swamped by an influx of families that already have a place to stay, or develop policies that discourage use of the shelter by doubled-up families.

Apparently the pattern of doubled-up families becoming homeless is relatively new. According to "A Comprehensive Plan," the plan issued by the HRA in 1984: "Until recently the most frequent cause of family displacement was eviction for nonpayment of rent, or a disaster such as a fire or a collapsed building. This has also changed. Today, more than one-half of all new families requesting assistance have been evicted by the primary tenant in a shared household. . . . Although it is not certain why such a large number of shared households were dislocated in a relatively short period of time, it is clear that the shortages and cost of permanent housing have forced a sub-

[7] "Housing Family in a Shelter Costs City $70,000 a Year," *New York Times*, March 7, 1986, p. B3.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

stantial number of families to enter into cooperative living arrangements. Despite HRA's intensive efforts to maintain these arrangements by providing financial assistance where appropriate and permissible, families continue to be displaced because of problems and tensions which occur in such arrangements."

Are homeless families different?

Is there any ground for assuming that homeless families are particularly troubled? The Office of Policy and Economic Research at HRA has done a great deal of work to discover just what, if any, demographic traits distinguish homeless families from poor nonhomeless families.

It turns out that there are some differences between homeless and nonhomeless poor families, but nothing dramatic. Homeless families did not pay much more in rent than nonhomeless AFDC and AFDC-U families do. Homeless families were more mobile, moving an average of 3 times in six years, against 1.3 times in six years for AFDC families. They had somewhat more crowded quarters: 14 percent lived in what HRA calls "furnished rooms," essentially single-room occupancies; only 3 percent of nonhomeless AFDC families live in such rooms. The geographic distribution of the former homes of homeless families is identical to the geographical distribution of AFDC families in general. It has been argued that gentrification and displacement are contributing to homelessness, and perhaps the initial displacement of homeless families does take place disproportionately in gentrifying neighborhoods, but evidence on previous location does not show this.

But what about behavioral or mental health or social functioning differences? Most officials at HRA do not think homeless families are different from similar nonhomeless families in any significant way. To quote Diane L. Baillargeon, director of HRA's Office of Policy and Economic Research: "While there are certainly some compelling reasons for assuming homeless families are particularly troubled, the remarkable similarities between homeless and all public assistance families in terms of their lengths of stay on public assistance [long lengths of stay are arguably an indicator of relatively poor ability to function] suggest that some caution about this conclusion might be appropriate."

Nevertheless, some research on the functioning and behavioral and mental health of homeless families suggests otherwise. Ellen L. Bassuk, M.D., of Harvard University, conducted in-depth clinical interviews with fifty-one mothers and seventy-eight children living

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in six family shelters and two battered women's shelters in Boston. Although the full results of her study are not available as of this writing, some preliminary data is available in two unpublished monographs: "The Feminization of Homelessness: Homeless Families in Boston Shelters" and "Homeless Families: Single Mothers and Their Children in Boston Shelters." Bassuk has not yet been able to compare her subjects with a control group of similar nonhomeless families, but her studies do seem to suggest that homeless families are especially troubled. The demographic profile of homeless families in Boston is very similar to that of New York families, in terms of race, dependency on public assistance, and family composition.

What kind of living situation did these women come from? In "The Feminization of Homelessness," Bassuk writes: "Our data indicate that more than two-thirds of homeless mothers have grown up in disorganized families and suffered from at least one major early family disruption such as divorce or the death of a parent." Is this simply the background of most families in poverty? Without a comparative sample, one cannot say, but Dr. Bassuk writes:

> These mothers [who have become homeless] now lack the ability to establish themselves as autonomous adults. Although not psychotic, two-thirds of the women suffer from personality disorders. They are unable to form and maintain stable relationships, have poor or nonexistent work histories, *have been unsuccessful in establishing stable homes even when housing is available*, and most important, have extreme difficulty parenting (emphasis added).

These troubled parents seem to be passing on their behavioral problems to their children just as similar legacies of dysfunction were passed on to them. Bassuk found, for example, that a majority of the children she interviewed had serious emotional problems which were not characteristic of similarly poor children. For example, the interviewers found that, using a childhood depression scale, the majority of the children she interviewed (51 percent) who were older than five years were depressed, and that their overall depression scores were higher than for those comparably poor but not homeless. Bassuk then concludes, "Based on our preliminary data I will argue that it is not only the economics of poverty that has created the new phenomenon of homeless families but the combined effects of poverty, violence, and profound deprivation of a person's development and self esteem."

The question of mental health

Another study, "The Forgotten Ones: Treatment of Single Parent Multi-Problem Families in a Residential Setting," by Michael H.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Phillips, of Fordham's Graduate School of Social Work, seems to point to similar findings. He studied 97 homeless families that were resident in the Henry Street Settlement Urban Life Center between January 30, 1978 and August 30, 1979. The Henry Street Settlement was opened in 1972 and it is what HRA officials refer to as a "Family Center," that is, a relatively high-quality apartment, as opposed to the barracks shelters and welfare hotels the city also keeps homeless families in. At least in the case of Henry Street, assignment to a family center is random—families are not intentionally assigned to Henry Street that are either more or less troubled than families in the rest of the system.

Although at first inspection Phillips's decision to focus on "multi-problem" families would seem to select for unusually disturbed subjects, it turns out that the study's definition of "multi-problem" is so inclusive as to apply to virtually any homeless family. Out of a pool of 308 families admitted to the settlement between January 30, 1978 and August 30, 1979, Phillips eliminated all families that were not female-headed and all families that were admitted to a special battered woman's program in the settlement. This left 175 potentially eligible families, all but 10 of whom counted as "multiproblem." Another two were dropped because the mothers were judged to be psychotic and incapable of being interviewed. Of the remaining 163 families, all who did not stay in the settlement at least ninety days were dropped from consideration, leaving 97 subjects.

One of the most striking findings of the study casts doubt on the widely held assumption that mental illness among homeless families is rare. Phillips attempted to get a sense of the mental health of the heads of the families he studied, first by self-report, then by looking at past mental hospitalization and out-patient care. He found that: "Slightly more than one-third of the mothers (36 percent) also reported they have had a mental illness or 'problem with their nerves' in the past. *Nineteen percent reported having been hospitalized for the condition and another 17 percent stated they were treated on an outpatient basis*. This figure may be underestimated because of the lack of willingness or embarrassment in acknowledging such difficulty (emphasis added)."

One has to be very careful with these figures. The value of self-reporting in determining mental health status is not clear, especially when the question is worded—as it was here—to include "problems with their nerves." On the other hand, previous hospitalization is generally taken as one of the more objective measures of experience with mental illness, and this study shows that 19 percent—nearly one-fifth—of the mothers had been hospitalized. By way of contrast,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

there is a rate of prior psychiatric hospitalization among homeless individuals of about 33 percent.[8] If the subjects of Phillips's study are typical of other homeless families—which is something we don't know—it may be that mental illness among the heads of homeless families is more prevalent than was previously believed.[9]

But this finding regarding mental illness was not the only one that indicated that the subjects—and perhaps other homeless families who are like them—had behavioral problems. For example, while interviewing the heads of households, Phillips used the Childhood Level of Living Scale, a series of questions designed to determine how well families take care of their children and if there are any signs of child abuse. The questions were asked at both the intake of the families and when they left the shelter. Phillips found that 69 percent of the families provided less than acceptable care to their children, with 40 percent providing neglectful care. Phillips also tried to measure how well family members functioned as a unit by using the Geismar Family Functioning Scale, and to measure the amount of stress the families were under before they came to the shelter by using the Social Readjustment Rating Scale (SRRS). There is not enough space here to go into detail on how these tests work, so we can only mention Phillips's results. In terms of family functioning he found that it "ranged [among the subjects] . . . from below marginal . . . to above marginal . . . but not yet near adequate. . . . To gain some perspective on how troubled these families are, it should be pointed out that these families had lower family functioning scores than was true of the families studied in *The Multiproblem Dilemma*, which was a study of multiproblem welfare families in Chemung, New York." In other words, on this particular scale, homeless families tended to score lower than similar nonhomeless families. With regard to the SRRS, Phillips found that homeless families lead a highly disorganized and stressful life even before they reach the shelter. He concluded that the results of the SRRS "clearly . . . reflect the chaotic nature of the life circumstances of these families."

[8] Stephen Crystal, et al., "Chronic and Situational Dependency: Long Term Residents in a Shelter for Men," Human Resources Administration, New York, May 1982.

[9] Another study may be coming to a similar conclusion although final findings are not yet in. Kay Young McChesney of the University of Southern California is director of that school's Homeless Family Project. She found that out of a total sample of seventy-three heads of households for whom information was available, 14 percent had been hospitalized for psychiatric reasons and that out of a sample of seventy-six, 20 percent of the heads of households had seen a psychiatrist. (Admittedly, seeing a psychiatrist is not a strong sign of mental illness. However, as mentioned above, previous hospitalization is taken as a more objective indicator of mental problems.) Since everyone who had been hospitalized must have seen a psychiatrist, about 20 percent of McChesney's sample would seem to have either been hospitalized or otherwise sought professional help.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Other social workers also believe behavioral and psychological disorders among homeless families indicate dysfunction above and beyond lack of housing. Consider, for example, a comment on the findings of the Phillips study in "Homeless Welfare Families: A Search for Solutions: New Research on Multi-problem Families," the proceedings of a research utilization workshop in 1981 edited by Roy L. Leavitt and sponsored by the Community Council of Greater New York: "The important difference between the families selected for this study and low income families, the authors contend, are *functional and not structural* (emphasis added). Families headed by single females run a great risk of having lower incomes and living in inadequate—often severely deficient—housing for which they must pay a much larger portion of their income in rent. . . . But for the most part, these families remain stable, adequately solve their problems and successfully meet crises that arise with work, illness, child-care and schooling. The [homeless] families in this study, however, have failures—in reality a prolonged series of failures from which they never fully recover—which indicates an inability to meet their health, economic and housing needs."

Clara Fox, the executive director of the Settlement Housing Fund for the Community Council of Greater New York, makes similar points:

> Based on my work with people in the field, I know that, if you ask them, private landlords cite two problems with the families we are talking about: (1) vandalism and other anti-social behavior, such as physical destruction of buildings and other property-related destruction; and (2) non-payment of rent. If you ask tenant leaders and leaders of tenant organizations, who sponsor housing and who work on advisory councils in public projects, they cite the same problems. You will not find too many differences between the way tenant groups view problem families and private owners view these tenants. In fact, tenant groups with whom we work and who are responsible for tenant selection are much more severe, much more harsh in their evaluation and in their criticism of these families. They will say: "We also grew up in poverty; we also went through the welfare system. Some of us are still on welfare. We do not behave this way. And we don't want, no matter what you tell us, or what HUD's affirmative action programs may be, or the Housing Authority's program may be, to take people on a first come first serve basis with no regard for history of behavioral or attitudinal problems. We have to live with them. You do not. We do not want them . . ." People who work in public housing know that one of the main requests they get is to stop putting more of these problem families in public housing.

To sum up: homeless families have problems aside from lack of housing. Housing problems do exist, especially in areas such as Boston and New York City. But while a shortage of inexpensive housing

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

does lead to an increase in doubling up, it is the weakest families that are unable to cope with the situation and end up homeless. And "weakness" here should not be taken to mean simply those families that are poor in a strictly economic sense. The greatest obstacle to surviving in a tight housing market may not be so much economic poverty as functional problems which make it difficult to make the relevant alternatives to homelessness—such as doubling up—work. If indeed not only private landlords but tenants in public housing don't want to put up with such people, it is not likely that they will find many family members or friends willing to put up with them either. But besides private housing, public housing, and doubling up, what other options do multiproblem families have? Not many, which may be why so many of them indeed end up seeking emergency shelter.

Shelter policy

So far we have looked at changes in New York City's housing market and at the nature of homeless families themselves for some idea of why we have a homeless family problem now. But there is at least one other area we must consider: shelter policy itself and the effect changes in it have had on the homeless and potentially homeless.

As was mentioned above, New York City has been using hotels to house homeless families for many years, with the high point of the case load during the 1970s being 1,346 families. Although available data are not clear about shelter policy during the 1960s and 1970s, it appears that the city would screen applicants for emergency shelter, and that not every family that applied for temporary housing got it. (The HRA's *Monthly Statistical Reports* contained a page devoted to "Shelter Service for Adults." Under the category for emergency assistance families appeared the three headings "Received," "Accepted," and "Rejected.")

If indeed not every application for family shelter was accepted, then that policy changed in 1979. It was then that the city signed a consent decree agreeing to provide shelter to all homeless men who applied for it. (The policy was later extended to apply to women as well.) At this point, there was no sense in providing shelter to only homeless individuals, so city policy was extended to all family applicants.

No figures are available on the number of homeless families admitted into the system between 1976 and 1982, so it is impossible to tell if the new policy had any immediate impact on the number of families applying for and getting shelter. We can, however, see

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

how homeless families are using the system now, and ask whether their behavior is consistent with the assumption that unless the city provides every family that applies with emergency shelter, most families would have nowhere else to go but the street.

The most recent report on how homeless families use the temporary shelter system is "Characteristics of Homeless Families: December 1985," by the HRA's Richard I. Towber. The study is based on interviews with seventy-seven homeless families appearing at selected Income Maintenance Centers (IM centers) and EAUs during the week of December 9, 1985.

On the matter of alternative housing resources, the report documents that a majority of families applying for emergency shelter do have other sources of housing available to them, although for most, these alternatives are available only temporarily:

> Many of the families have alternative resources that they can draw on at least occasionally: 59 percent sometimes tap friends or relatives for a place to sleep, and 26 percent thought they could find a place to stay on the night they sought shelter from HRA "if it came to it." Indeed 61 percent said that they would not accept just any shelter offered by HRA, with the vast majority (89 percent) saying that they would decline a congregate [barracks] shelter. . . . These responses are consistent with the patterns revealed by administrative records showing that about one-quarter of the families made their own arrangements. Thus, for some families, HRA's temporary housing operation constitutes *one of several resources* tapped by the families during their period of homelessness (emphasis added).

The report also states that "many homeless families appear able to find housing for a few nights or can obtain some food or money in a pinch. But this assistance is not substantial enough to sustain independent living." The fact remains, though, that about one-quarter of the families admitted they could find a place to stay outside the city system on the very night they were applying to the city for shelter—and this number may be underestimated since it is based on what clients would admit to at the very time they are applying for emergency shelter. Indeed, 61 percent of the families said that they would not accept just any shelter from the city, and 89 percent said that they would decline a congregate shelter. We must assume, therefore, that families that are willing to turn down the offer of what appears to them to be substandard shelter at least think that they have some kind of alternative shelter available.

Hidden alternatives

How many actually reject the shelter the city offers them and somehow find a real alternative? The city offers some sort of shelter

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to everyone who requests it. Everyone who appears at an IM center or EAU receives placement at some kind of shelter and is directed there. Of the families so directed, how many actually show up at the shelter or hotel that is waiting to receive them?

We have no certain information on this point, but Larry Perlman, former Assistant Director of Income Maintenance Operations for HRA and the person responsible for the agency's housing activities, says: "About 30 families every business day show up at the EAU and seem to be eligible for temporary housing. But less than a third of them enter the system because the shelter doesn't appeal to them. . . . It doesn't stretch my credulity to assume that not everyone in the system is a victim."[10]

Later figures suggest that even larger percentages of families are rejecting the shelter they are offered. According to Steven L. Taylor, about five thousand requests for shelter are made each month at IM centers and EAUs. If one eliminated duplicate requests, these numbers represent about 2,500 separate families, all referred to a shelter of one sort or another. But no more than 600 families enter the system each month. What, one wonders, happens to the other approximately 1,900 families? No one knows for sure but it is unlikely that they end up on the streets, because there are no indicators that more than a very few homeless families are living on the streets in New York City. Many applicants don't like the accommodations the city offers—especially the barracks shelters—and find some place other than city-provided shelter to stay.

If this is what is happening, it is not by accident. The city, over the protests of the advocates for the homeless, has adopted a fairly open policy of deterring inappropriate use of the shelters by homeless families. Its main instrument in this policy is the use of barracks shelters. In the past, most families seeking emergency shelters were sent directly to a hotel. Now, such families are usually—unless they have special needs such as a pregnant mother or a newborn child—first sent to barracks shelters, such as the Forbell Street Shelter or the Roberto Clemente Shelter. The idea, according to Mayor Koch, is that, "we are going to, whenever we can, put people into congregate housing like the Roberto Clemente Shelter—which is not something people might rush into—as opposed to seeking to go into a hotel."

In short, the city is deliberately using assignment to barracks shelters as a way of deterring use of the system. The advocates for

[10] Quoted in "New York's Homeless Families," Tom Robbins, *City Limits*, November 1984, pp. 2, 7–12.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the homeless are aware of this and are vigorously pushing to have the barracks shelters closed and to have better, private accommodations built. If barracks shelters are eliminated and conditions in the rest of the system are improved enough so that emergency shelter becomes a rather better alternative than relying on a family's own resources, there can be little doubt that more of the 1,900 families now assigned to shelters each month but failing to use them will start accepting the city's offer. This is not to say that shelters can't be improved somewhat; but if they are improved, some kind of screening process will be necessary that will humanely exclude families with other resources. If the poor conditions of the family shelter system—which is now the main deterrent to inappropriate use of the shelters—are improved (and they should be) and no other mechanism for discouraging shelter use by families with other resources is instituted (and it can't be if families have an absolute right to shelter), the net result will have to be a rise in the shelter census. The current problem for policy towards homeless families is to find some way to both improve conditions in the city and to continue to discourage use of the system.

To sum up, there is no question that the lack of low-income housing in New York City is partly responsible for the city's current high rate of homelessness among families. But it is not the only cause, for now is not the first time the city has had a low vacancy rate or high levels of overcrowding. Other factors must be at work. Homeless families seem to have greater behavioral or psychological problems than do similar nonhomeless families. And the numbers of such troubled families could be increasing. It may be that such families are less able to adapt to the problems—especially the need to "double-up"—that a tight housing market forces on them. Also important is shelter policy itself, and especially a shift from a more restrictive policy that was in force during the 1960s and most of the 1970s to an open door policy. The challenge to the city now is to find some more appropriate way to house families in need of emergency shelter but without provoking a flood of applicants. This is a problem that will require considerable imagination—not slogans—to solve.

Can anything be done?

The first thing that has to be said about the homelessness problem is that solving it is going to take time. There are no quick fixes in sight for getting people off the streets, out of the shelters, and into private housing.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

We do need more research, and the research I have in mind is not especially arcane. Better nose counts of the homeless in the cities where they are a major problem would not only clear the air of current inaccurate figures but would provide useful guides to policy. Such work could do for the study of homelessness what the development of the poverty line did for the study of poverty: it does not solve the problem but it imposes a discipline and consistency on the discussion of the problem which are sorely needed.

As in so many areas of social policy, we are clearer on what we should not do than on what we should do. Currently, New York City's homeless advocates under the organization of the Committee for New York's Future are circulating a petition to have an initiative placed on the municipal ballot that would require the city to provide shelter to homeless families as a matter of right, and that would also require the city to eliminate barracks shelters and provide each family with a private room. The right to shelter for families is an entirely moot point, since the city has been providing shelter to any homeless family that applied, at least since 1979. Further, a New York State Appeals Court in the case of *McLain* v. *Koch* ruled that the city has an obligation to provide shelter to all homeless families that apply. What, then, can be the point of this initiative since a right to shelter already exists? The reply the advocates make is as follows: "Under a recent court ruling, all needy families in New York must receive shelter. However, the conditions are so damaging and the duration of a family's stay at any one facility is so uncertain that these shelters do practically nothing to help the families out of their situation." The goal of the advocates is thus not to see to it that every needy family receives shelter, since that is already happening, but rather to improve allegedly "damaging" conditions. We have already seen the problem with this position: if one improves conditions in the shelters this is bound to produce a considerable expansion in the demand for shelter. The only way to prevent this result would be to institute a more selective admissions policy, but the establishment of a right to shelter for everyone makes this impossible. In short, the combination of a right to shelter along with an end to all conditions that act as a deterrent to shelter use is not a practical strategy. Consequently, the advocates' initiative should be resisted.

But what may we do positively to solve the homeless families problem? The sad fact is that there is probably no short-term answer to the problem of homeless families. Such long-term answers as they exist are to be found in reforming the city's housing policies with an

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

eye to increasing the availability of low-income housing—which means that such issues as the impact of rent control, the effect of enforcement of the housing code, the workings of the housing courts, city use of city-owned housing stock, and city welfare policy and its effects on the process of abandonment all have to be reconsidered in light of the need to produce more low-income housing, or at least not to destroy such stock as we have left.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Toward a permanent housing problem

PETER D. SALINS

THE PROBLEM of how to house the poor has been one of the most tenacious issues in the history of American social policy. Since the beginning of the industrial revolution, social reformers have vigorously criticized the foul housing conditions in the worst neighborhoods of our cities. Even today, after a century of sustained economic growth and increased government intervention have virtually insured the basic needs of most Americans, there still remains a nagging perception among both scholars and the general public that a significant number of America's families are not being adequately housed.

The apparent permanence of this perception is certainly not due to any lack of interest in the problem. Politicians have been encouraging periodic private and public housing reforms since the turn of the century, and since 1949 the promise of decent housing for all Americans has become enshrined as a high priority objective of national policy. The housing act of 1949 specifically seeks to achieve "a decent home and a suitable living environment for *every American family* (emphasis added)." In pursuit of this objective the national government, since the housing act was passed, has subsidized the construction of 1.2 million new apartments for the poor, 800,000 new apartments for moderate-income families, and 700,000 new

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

apartments for the elderly. It has also underwritten as many as 1.5 million rent supplements per year, and offered housing assistance to tens of thousands of households under other subsidy rubrics. Altogether it is estimated that over 5 million subsidized housing units have been built or rehabilitated since 1950, embodying an aggregate federal contribution of thirty-five billion dollars and this figure does not even include the indirect benefits accruing to the entire housing sector due to various features of the taxation and banking laws.

The foregoing represents just the national effort since virtually every state, and most of the larger cities, have agencies dedicated to the improvement of housing conditions for the poor. While some of them act merely as conduits for federal assistance, many supplement such efforts with local resources. Today there are at least five hundred thousand families living in housing subsidized primarily by states and localities with the local assistance programs, AFDC (Aid to Families with Dependent Children) in particular, underwriting a large portion of their rents.

Why, then, is housing for the poor still so problematic? After all, we have largely eliminated hunger (through general affluence supplemented by food stamps); we have nearly universalized access to health care (through employer financed insurance plans supplemented by Medicaid and Medicare); and everyone appears to be reasonably well-clothed. Even luxury consumer goods reach the lowest income households, so why does housing stand out as an area where the welfare state has failed even after decades of costly government intervention?

The answer, of course, is that it has not really failed. Never before have so many been so well-housed. The more accurate question to ask is: why do so many thoughtful people think it has failed? The answer lies in our inability to agree on two things: what constitutes acceptable housing, and who deserves housing assistance.

The moving target

The inability to define consistent housing standards and goals is what I call the "moving target" problem. One reason that substandard or inadequate housing never seems to go away, no matter how much money we throw at the problem is that we keep redefining and raising the standards of what can be considered decent housing. For example, in the first half of the century one of the most critical dimensions of housing inadequacy was overcrowding. Not only was this problem seen as degrading, it was associated with such health

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

problems as tuberculosis. Fifty years ago overcrowding meant that more than 1.5 persons in a household were sharing a room. The 1950 standard was set at more than 1.0 persons per room and at that time over 16 percent of all homes were considered "overcrowded." By 1970, overcrowding had abated to the extent that fewer than 8 percent of all dwelling units had an occupancy of more than one person per room. Rather than rejoice over this accomplishment, housing experts concluded that overcrowding was not such an important test of housing adequacy after all. Progress on this front continues nonetheless. Today's figures suggest that fewer than 4 percent of all U.S. households exceed the one person per room standard, and only a negligible fraction exceed the earlier 1.5 person standard.

Another "moving target" among housing conditions concerned plumbing facilities. When a great many houses and apartments lacked a full complement of indoor plumbing, meaning that many families had to share kitchens and bathrooms with others, this was considered an essential shortcoming of the nation's housing stock. In 1940, nearly 45 percent of all dwellings lacked some private plumbing components. By 1970, fewer than 10 percent of all homes suffered from such deficiencies but this criterion also became an insufficient measure of housing "adequacy."

Having nearly wiped out overcrowding and inadequate plumbing, policymakers in the 1960s gave birth to a new target: "dilapidation." This refers to the kinds of visibly unsatisfactory physical conditions that characterize run-down houses or apartments and it too remains another housing objective which has largely been conquered. Although official data on dilapidation is no longer gathered, the last census which did, in 1970, indicated that only 3.7 percent of the housing stock met the official definition of dilapidation. This is one-fifth the 1940 rate of 18 percent. Dilapidation, as an unsatisfactory objective condition, has not quite disappeared as a housing criterion. But since so much dilapidation can be obviously remedied with sweat equity (people painting their apartments, glazing their broken window panes, unstopping their toilets) or minor rehabilitation and repair expenditures, it is fading fast as an objective of reformers' concern. Attention has now shifted to neighborhood quality and "affordability."

Today's housing reform advocates argue that even when dwelling units occupied by the poor are not overcrowded, contain their own kitchens and bathrooms, and may even be in somewhat decent repair, they are set in a dismal environment. They are surrounded by abandoned buildings and located on streets that are unsafe and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

littered with trash. Neighborhood deterioration is, of course, a highly subjective condition. For example, the Annual Housing Survey of 1983 tried to get a fix on the problem by eliciting the incidence of a host of arguably "unsatisfactory neighborhood conditions." It found that one or another of such conditions was present near the homes of 64 percent of the respondents. However, only 37 percent of the survey households found any of the conditions "bothersome," and fewer than 10 percent thought they were bothersome enough to consider moving.

Another moving target emerges when the point is pressed that even the poor families whose homes suffer from none of these deficiencies are paying too high a proportion of their income for rent. This is the problem of "affordability" which has emerged as today's favorite version of the moving target. A household faces an affordability problem, it is argued, if it must pay more than—choose your standard—25 or 30 percent of its income in rent. The affordability criterion is an especially slippery one. The ratio-busting rent level numerator is as likely to reflect the owner's (or society's) preferences for higher quality dwellings as it is to indicate exorbitant rent inflation. The income denominator in this affordability equation often fails to reflect the noncash forms of public assistance (food stamps, medicaid, etc.) or the unreported income which a family might receive. Additionally, the affordability concept cannot be appropriately applied to the situation of well-housed middle-income families who deliberately choose to devote a high proportion of their budget to shelter. I do not wish to belabor the point of whether housing today is indeed more or less affordable than in the past. I merely cite this criterion as the latest in a long, and possibly endless, line of problematic housing targets which are discovered as earlier ones fade away, thereby sustaining the permanency of America's housing problem.

Not only do we constantly change the criteria for assessing housing inadequacy, but the evolution of the criteria has been in a direction away from specific intolerable, measurable, and remediable conditions such as density of occupancy, availability of plumbing facilities, etc., toward more subjective, and therefore often insoluble, conditions. The identification of housing problems has been moving steadily toward conditions that defy consistent description or measurement, conditions that many analysts—or the tenant sufferers themselves—do not find unacceptable, and conditions that are more descriptive of the tenants and their behavior than of the housing stock. Obviously such housing conditions can never be eliminated.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The broadened target

A second reason for the persistent perception that housing is a problem arises from the tendency of the housing policy community to expand the definition of the eligible population over time. The earliest reformers were intent on eliminating the stock of clearly wretched housing, the "slums" as they were (and still are) called regardless of the characteristics of the slum dwellers. When so much of the nation's housing was distinctly inferior, helping the housing rather than the housed was a perfectly reasonable approach, given the unlikelihood that any sizable number of nonpoor would inadvertently benefit. With the Great Society programs of the 1960s and since, the potential beneficiary class began to expand. We heard increasingly about the need to help low- *and moderate*-income families, with "moderate" income often defined as a threshold near or even above the national median. The consequence of this target broadening is that today over one-third of all housing-assisted families belong to the moderate-income group. It was argued that we needed to broaden the reach of the housing agenda because:

a) moderate-income families fell between the cracks of the housing market; too rich for subsidized housing, but too poor to enter the private housing market without assistance,

b) subsidized housing projects or neighborhoods of subsidized housing would be "stabilized" if they were not entirely income segregated. In other words middle- and lower-middle-class families had to be bribed to live in such areas to lend balance and provide behavioral norms for the poor, and

c) many poor families eventually emerge from poverty to cross the eligibility threshold and should not be required to move when that happens.

None of these justifications is entirely without merit. Nevertheless, the expansion of the beneficiary class eligible for housing assistance has undermined efforts to help the poor. For one thing, translating such a concept into operational programs has meant spreading what must inevitably be a limited dollar amount of money across a larger target population. Such programs displace poor potential recipients with more affluent ones and result in the underwriting of fewer, but more expensive, homes. They also disrupt the fragile private market for lower-priced housing by putting discount-priced publicly assisted housing in competition with that of private owners and developers, often triggering the kind of wholesale deterioration of neighborhoods that now looms as an important criterion of housing inadequacy. Such programs tempt upwardly mobile lower-middle-class families into neighborhoods of great social instability, possibly

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

blighting their hard-won prosperity. Finally, broadening the eligibility base has confused the general public and the housing policy establishment alike. To the degree that government housing assistance is viewed as an entitlement reaching well into the middle class, it raises expectations that can never be fulfilled thus adding to the apparent permanency of the housing problem. The fact that such programs inevitably help families (or elderly individuals) who are not currently "housing disadvantaged" appears unfair to spokesmen of both ends of the ideological spectrum. Advocates for the poor see housing as yet another area of public policy where antipoverty programs are preempted by the middle class; conservatives believe that housing is yet another field where the government needlessly preempts the private market.

In addition to attacking a "moving target" and serving an ever widening group of recipients, housing policy has always been profoundly inequitable. Among one hundred poor households potentially eligible for housing assistance, eighty-five will receive no help whatsoever; of the fifteen households that are helped, three may receive a luxurious new apartment in an excellent neighborhood, four may get a modest unit in a deteriorating area, and eight may end up only with a rehabilitated older apartment or a slight reduction in rent. Housing assistance, unlike, for example, public assistance in nutrition or health care, is a lottery. Any eligible family has only a small chance of winning at all, and like all lotteries, the prizes vary enormously in value.

Another dimension of inequity involves the relations among the assisted population and the unassisted. Especially as the income standards for eligibility are broadened, many families receiving housing assistance will have higher incomes than those that do not. The result is that families lucky enough to receive assistance to occupy better housing may be the very families that are purportedly too well-off to be eligible for housing in the first place.

Nor is there any assurance that eligible families were poorly housed before they received housing assistance. Many well-housed families move to subsidized housing while many of the occupants of —by current definition—substandard housing, are passed over.

Defining the problem

However open to criticism the legacy of housing policy might be, it would be difficult to argue that no Americans face a housing problem. To speak of a housing *crisis*, however, is not only hyperbolic, it is simply untrue. Clearly, housing conditions in the United

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

States have improved steadily over the years and the vast majority of American families and individuals are well-housed by any historical or cross-national standard. The remaining housing needs must therefore be viewed in the light of this success.

Policymakers must determine who among the poor requires housing assistance. Housing reformers have used the blanket rubric of "housing disadvantage" to characterize all households who live in overcrowded or dilapidated dwellings, or whose homes are in "deteriorated" neighbhorhoods, or who devote more than 30 percent of their (cash) income to rent. The largest cohort of such households is comprised of families with children headed by women, many of whom are on welfare. Approximately 25 percent of all housing disadvantaged poor families are female-headed, and nearly 50 percent of all female-headed households are housing disadvantaged. This group accounts for only 7 percent of the nation's households, but represents 15 percent of the population of large cities. Female-headed families are, of course, at the core of all poverty-related problems of our society. Housing is only one of their more conspicuous needs.

Other housing disadvantaged cohorts among the poor include young, single, unemployed males (not living with their parents) and the functionally impaired. Both groups, like the female-headed families, depend heavily on public assistance and both groups are disproportionately part of the growing "homeless" population.

The elderly are everyone's favorite needy group, in housing as in other areas of need, but as a class they have actually been doing quite well. Over 60 percent own their own homes, and a variety of private and public programs allow elderly homeowners to cash in their equity to help meet their monthly bills. As long-term residents of rental housing, the elderly are often vested in relative housing bargains. Finally, the incomes of the elderly are rising more rapidly than those of the rest of the population because of the broadened scope and rising benefit levels of social security.

One group decidedly *not* among the housing disadvantaged by any objective standard is that made up of young married couples, with or without children. Such families are often cited in popular stories about the growing housing crisis, especially if they are in the market as first time home buyers. It is also this group that is most apt to benefit from the broadening of the eligibility base for housing assistance. However, young couples are generally among the best- rather than the worst-housed sectors of the population.

The heart of the "moving target" issue raised earlier is how bad are housing conditions for the poor. By objective historical or inter-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

national standards, even the housing of our poorest families is not so bad. Of the thirty-seven million households classified as "lower income" (meaning they receive less than 80 percent of the median income), fewer than 4 percent live in homes that are overcrowded, only 5 percent lack internal kitchens or bathrooms, and only 10 percent live in dwellings that are dilapidated. As indicated earlier, the main contemporary concerns of housing reformers are the badly deteriorated neighborhoods in which the disadvantaged groups live, and/or the share of their income that pays for housing.

However, if we look at the residual American housing problem in absolute rather than proportional terms we are necessarily talking about a lot of people. Over seventeen million households suffer from some aspect of housing disadvantage. Nearly six million live in "physically inadequate" housing (dilapidated units, or otherwise deteriorated structures and neighborhoods), slightly over one million are overcrowded (more than one person per room), and nearly eleven million pay more than 30 percent of their income in rent. Even these concerns must be seen in the context of such observations as: many of the stigmata of "deteriorated neighborhoods" are supplied by their residents, and, as noted, the rent/income ratios do not always reflect the upgrading of housing quality or the dollar value of noncash public assistance or off-the-books income. In short, the heart of the contemporary housing problem is that many of the poor live in fairly decent dwellings in rotten neighborhoods, and they have little money left over after they pay their rent. In addition, we must reckon with the housing conditions of the totally dysfunctional who spend their nights in the streets or public shelters because of an inability to find, maintain, or pay for any housing at all.

Government programs: have they helped?

This is an enormously contentious question in housing policy but my answer would be: not much. To begin with, national and state housing programs have reached only a fraction of the families that are nominally eligible for housing assistance. This is because housing assistance, unlike food stamps or medicaid, for example, never was viewed as an open-ended entitlement for the eligible population. In some years a great deal of public money went into housing, in others very little. Many housing dollars were "wasted" (from the viewpoint of helping the maximum number of ill-housed poor secure decent housing) by building a smaller number of new expensive apartments rather than building many cheap ones, or fixing up an even greater number of old ones; and by helping a very large num-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ber of families that were neither poor nor badly housed. This negative evaluation becomes even bleaker if one believes the conclusions of several studies which argue that the public inventory of housing construction *displaced* rather than added to the stock built by the private sector.

How then can we account for growing improvements in housing? The most convincing explanation is that rising incomes and high rates of private housing production have so expanded the supply of, and demand for, good housing that the worst dwellings were simply knocked out of the inventory. In addition, the upgrading of housing owes something to the "push" of old housing demolition which has reinforced the "pull" of voluntary moves to better housing on the part of those families who had high enough incomes and new homes to beckon them. Federally subsidized urban redevelopment, for example, has been an important factor in speeding the demolition of the stock of inner-city substandard housing. While urban redevelopment did not enlarge the stock of low- or moderate-cost housing (because it was meant to revive "blighted" downtown areas with upscale commercial activity and high-rent apartments), the "federal bulldozer" did sweep away many longstanding slums. Nevertheless, the problem of deteriorated neighborhoods continues and several theories, none standing without challenge, have attempted to explain why.

One view, which I will call the "musical chairs" paradigm, blames the very success of the housing market in producing so much new housing. The argument goes something like this: Housing conditions at the individual dwelling unit level improve when the average rate of new housing production over a period of time exceeds the rate of new family formation. This permits families to "trade up" in housing quality, even if they must pay more for their new homes than the ones they leave. Something has to happen to the dwellings that are left behind. Usually they are passed down to successively lower-income households until the poorest of contemporary families are brought into the process. But even the poorest households will leave their former dwellings behind. It is this stock of unwanted housing that drives the process of neighborhood deterioration in complicated ways. If all the poor traded up together, entire neighborhoods would be abandoned and sooner or later demolished. This is the kind of thing that urban redevelopment *forced* to happen for a while. Usually, however, moves out of older neighborhoods will be random and irregular, leaving pockets of vacancies. These pockets create high vacancy rates in many buildings causing their

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

owners first to neglect them and later to abandon them. The cancer of random vacancies spread over broad sections of the lower-income precincts of cities results in massive, visible physical decay.

Eventually, however, the resulting large decline in the inventory of low-cost housing may overtake the slack demand, causing rents to rise and displacing the poorest or most irresponsible tenants. The local community then faces a no-win dilemma. If slack elsewhere in the community can absorb the displaced households, the cycle of decay will resume in a new location. If, on the other hand, the local housing market is tight, the mostly disorganized families or individuals may wind up as wards of the municipality in temporary shelters—becoming members of the official "homeless" class.

An alternative theory of neighborhood deterioration places its primary emphasis on the social characteristics of the poor rather than on the dynamics of the housing market. This argument stresses changes that have taken place with respect to the nature of poverty and the kinds of people who are apt to be poor. As general affluence increased, and an increasing percentage of all families had incomes high enough to afford decent private market housing, those families who remained poor were increasingly apt to be deviant. The teenage mother of young children, in particular, is neither likely to take good care of her house or apartment, nor conscientiously teach her children to behave respectfully toward their physical surroundings or their neighbors. Under these circumstances, when the hard-core poor inherit formerly satisfactory housing in the hand-me-down process, they cause it to rapidly run down. Many such families in an area drive out the remaining respectable middle- and moderate-income families. The result: physical deterioration, high vacancies, and abandonment.

A third explanation blames the owners of rental properties and/or the banks that are expected to provide housing financing. This view assumes that as property owners see their building occupied by poorer (especially minority) families, they reduce expenditures for their repair and maintenance. A conspiratorial version of this view blames the disinvestment on the owners' desire to exploit the vulnerability of their tenants to secure windfall profits. A more generous version acknowledges that low-income families cannot afford to pay rents high enough to permit landlords to maintain their buildings properly. Property owners are not alone in the disinvestment process. They are complemented by the local banks who refuse to renew mortgages when they come due or to finance properties when they are sold to new owners. This "redlining" (based on the notion that

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

banks circle undesirable neighborhoods in red pencil on their city maps) starves low-income neighborhoods of necessary funds for maintenance and upgrading even where the housing stock is initially in good condition.

What's the solution?

Sound housing policy must be based on a realistic appreciation of the problem. In choosing among theories of deterioration, I personally lean toward a synthesis of the "musical chairs" and the "social characteristics" paradigms, although disinvestment undoubtedly plays an important part in the scenario of neighborhood decline. Any proof of one theory or another must rest on circumstantial evidence and inductive reasoning. For example, we have had considerable experience with policies that attempted to remedy neighborhood deterioration presumably based on landlord and bank disinvestment. Studies have shown that where there were no changes in the population composition of such areas, the infusion of public subsidies to reverse disinvestment has not been notably successful. We also have had considerable experience with providing housing for poor families in entire developments of well-maintained, publicly owned or assisted housing. In such cases neither disinvestment nor random vacancies and abandonment can be present. Nonetheless, where the population of these developments has been made up largely of female-headed households with young and teen-aged children, the projects suffer from serious physical deterioration, as well as crime, vandalism, and abuse of the public environment. But this does not mean that solving the housing problem for the poor is impossible.

We must recognize that sheltering today's poor—who have personal, social, and economic problems much more severe than yesterday's poor—according to contemporary housing standards that are considerably more demanding than those of the past poses a great challenge. Furthermore, this daunting task must be pursued with more slender resources. The public housing failures of the past, the retrenchment of the public sector, and the public refusal to engage so heavily in social amelioration or income redistribution all add up to an environment for housing reform which demands that we must rely primarily on the private market, and that we make sure that those housing subsidy dollars which are made available stretch further.

Above all, a realistic view of the housing problems of the poor, especially the ubiquitous spectacle in the cities from coast to coast of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

neighborhood squalor, demands that we fit our policies and programs to a brutally honest assessment of the constraints posed by the social and behavioral characteristics of the families we wish to help. We must recognize the role these characteristics play in causing dwelling and neighborhood deterioration, and reject the simplistic charge that such recognition means we are thereby "blaming the victim." We must also recognize the legitimate wishes of the poor themselves, who may interpret their needs quite differently from the physical and aesthetic meliorism of middle-class planners. They may not even want their meager allotment of subsidy crumbs from the public banquet table to take the form of housing assistance at all.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The deinstitutionalization story

W. ROBERT CURTIS

TODAY STATES FINANCE and manage 530 institutions to provide care for the mentally disabled—300 for the mentally ill and 230 for the mentally retarded. These institutions were created, for the most part, through state appropriations, and states continue to manage them directly. Despite two decades of deinstitutionalization, state institutions still meet practical as well as humanitarian needs.

Yet state institutions themselves are a relatively new initiative. Prior to the creation of these institutions by state government, the disabled were cared for in special "homes" scattered across most counties. Every historical analysis of the nineteenth and early twentieth centuries indicates that much of the impetus for creating state institutions was based on a desire to improve conditions in local county homes, where the blind, elderly, mentally ill, mentally retarded, and those dying from infectious or chronic diseases were boarded together and supported with minimal funding that often ebbed and flowed with the local economy.

Once established, state institutions grew inexorably, driving the census of state hospitals for the mentally ill to a peak of 559,000 in 1955 and the census of state schools for the mentally retarded to a peak of 195,000 in 1970. What produced this growth? First, the industrial revolution required new complex human skills and knowl-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

edge, especially in the workplace. Individuals not able to develop the requisite skills and apply them in a consistent manner to new jobs were left behind without income and then, without human relationships as time became man's most precious resource. Many states established huge farms as part of their new state institutions, partially to defray some food expenditures, but at the same time to provide sheltered work or day activities for its disabled residents; for decades these farms flourished because manual labor requiring minimal skill could often be performed by the disabled on a limited basis, apart from the competitive world that otherwise had little tolerance for their dependence.

Ironically, the New Deal and Great Society programs themselves were instrumental, at least before the policy of deinstitutionalization, in driving up the number of institutional residents. New social programs and a revolution in medical science, supported by federal expenditures, began simultaneously extending the length of life of the disabled and increasing the survival rate for infants born with serious physical and mental impairments. This increase in the number of disabled individuals and in the severity of their impairments placed new pressure for admissions on state institutions.

At the same time, the American family was undergoing enormous change. The multigenerational family, often willing and able to care for its disabled or older members, was replaced by a more resource-barren nuclear family. State institutions were expected to admit individuals too dependent to care for themselves when their families collapsed from exhaustion or merely became too old as parents to care for their disabled adult-child.

And finally, after years of believing otherwise, American society came face-to-face with the pervasive intolerance and discrimination that exists in most communities. The notion of the New England town coming together in self-management was an idea that worked, if it worked at all, only when community members were of a single religion, race, and ethnic background. The widespread intolerance of differences that exists in every heterogeneous community turned out to be easily triggered by socially unacceptable behavior—the hallmark of the severely disabled—and too often became sufficient grounds to warrant admission to a state institution.

By the mid-twentieth century, state institutions were bursting at the seams, filled by individuals with a very broad mix of disabilities, including some created merely in reaction to the gray world of institutional living. Although the provision of shelter, clothing, food, some day activities, and minimal medical care promised continued

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

life for its residents, institutional living came at a price. The institution could never replicate, even with unlimited resources, the kind of life to which most Americans aspired. And this quality of life, of course, was the standard to which the institution was held when it became the target for deinstitutionalization. The standard was as idealistic and generous as Americans can be; but it reflected little clear understanding of the human problems that county homes and then state institutions were created to address.

Mental illness and civil liberties

Until this time, there were few doubts raised about the responsibility assumed by state government in the care of the mentally disabled. The state's decision to create institutions for the disabled was widely seen as providing them asylum and sometimes successful treatment. This was good government, and seen by many as reflecting a caring society. Since the alternative in many cases was death itself, few questioned the *parens patriae* authority of state government. It seemed quite reasonable for state government to substitute its decisions for those of individuals who, without this parenting function, would likely not survive.

Two major events occurred in the 1960s and unfolded during the 1970s which changed the primary role of state institutions in mental health care. First, Congress enacted a number of statutes, beginning with the Mental Retardation Facilities and Community Mental Health Centers Construction Act, that shifted the focus of mental health care from state institutions to local communities. With these new laws, control of the mental health system flowed out of the hands of institutional superintendents, who like most state commissioners were physicians, and into the hands of social workers, psychologists, and other community-based professionals who it was thought were better suited to carry out comprehensive care. Second, individual rights of the mentally ill and mentally retarded came under careful scrutiny by federal courts. Under this judicial review, the liberty clause of the Fourteenth Amendment to the Constitution was for the first time interpreted as one protecting the mentally disabled from state decision making. In case after case, the federal courts began to limit the authority of state government (and its professionals) to make voluntary admissions, to deny requests for discharge, to choose the kind of treatment (especially treatment requiring chemical or physical restraints), and to decide itself about the level of funding provided for institutional care.

It is not difficult to understand, then, why state institutions became the target of both the "modern" mental health worker and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

civil liberties lawyers. Institutions absorbed most of the funding and, in their overcrowded conditions, were easily portrayed as examples of how harmful a state could be to its citizens. Residents, whose lives the state had in many cases saved, were now defined as its victims.

Contemporary mental health professionals and civil liberties lawyers offered new definitions of mental disability: "Mental illness" became a manifestation of social deviance, one that could be overcome by a more tolerant community and greater social support. Thus, for the modern mental health professional, the crucial intervention was one that changed community values. "Mental retardation" was best understood not as a permanent physical disability that precluded full human functions, but as a "developmental" disability, a learning problem. For the civil liberties advocate, the institution, by "imprisoning" its residents, was itself the cause of impairment.

For both the modern mental health worker and the civil liberties lawyer, effective care of the mentally ill rested on moving patients from the prison-like state institutions back to their communities, where social acceptance and tolerance would reduce if not actually "cure" mental illness. Effective care of the mentally retarded likewise rested on moving residents from large, impersonal state institutions to new, "normal" living environments in the community—settings that stimulated speech, hearing, touch, and taste, and thus renewed the learning inhibited by institutional living and, in some cases, perhaps even removed the disability it exacerbated.

Under this modern definition of mental disability, the state institution became the enemy of the disabled, and concomitantly, of those who advocated their rights in federal courts and called for care in the newly emerging community mental health system. Rather than being conceived of as asylums (places of respite, of care and protection), institutions were redefined as the place where the state (through its authority to admit, treat, and discharge) aggravated, if not caused, mental disability.

The creation and exercise of individual liberties by the disabled, as one of the new groups in modern society protected by the Constitution, became the force that drove community-based care. Local nonprofit agencies were to reduce if not replace state control. The end of institutions promised freedom from restraint for the mentally retarded and freedom of decision making for the mentally ill. To the civil libertarian this was the equivalent of cure. To the modern mental health professional it meant new manpower and resources for community-based care.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

One of the first and most important legal attacks on a state's *parens patriae* power came in 1972 when a federal court, in *Lessard* v. *Schmidt*, held that decisions made by a psychiatrist on behalf of someone presumed incapable of making them himself during an involuntary admission to a psychiatric center may not be made apart from a court-supervised "adversarial hearing" that protected the patient's liberty interests. The court found a state statute unconstitutional because it permitted involuntary commitment merely on the testimony of a psychiatrist that a patient was mentally disabled and a proper subject for custody and treatment. The court also ruled that any future state commitment statute must be construed to require proof of "an extreme likelihood that if the person is not confined he will do immediate harm to himself or others." This new standard of dangerousness and the adversarial proceeding in which it was applied effectively destroyed the state's "parenting" authority under the doctrine of *parens patriae*, at least as it would occur during a civil commitment.

In a single decision, this federal court reshaped the relationship between the mentally disabled and the state. Future decisions, at least those concerning involuntary commitment, would not be based on the "best interests of the patient" as determined by a mental health professional, but would be tested against an objective standard based on proof of danger capable of withstanding cross-examination.

Although *Lessard* and similar decisions in other circuits did not affect all institutional residents, these cases entirely changed the role of the state institution. By using criminal law standards and an adversarial rather than a paternalistic approach to decision making during a commitment hearing, and by focusing on the loss of liberty experienced by a mentally disabled individual living in a state institution instead of on the capacity of this individual to exercise liberty, the courts overnight redefined state asylums as prisons. As the *Lessard* court said, and as many courts echoed in the following years: "The power of the state to deprive a person of the fundamental liberty to go unimpeded about his or her affairs must rest on a consideration that society has compelling interest in such deprivation."

Targeting institutions

Lessard applied only to the disabled who resisted admission to mental institutions. A far broader attack on state institutions, however, was launched by civil liberties lawyers. The strategy adopted in state after state followed a rather similar pattern: 1) Select a state institution that is obviously overcrowded; 2) Identify several par-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ents or relatives of residents who are critics of the institution, then gain their support as future witnesses in federal court and obtain permission to use their relative as an example of a victim of state decision making; 3) Identify disgruntled (or recently fired) state employees who will also testify about institutional conditions; 4) Contact the press about the impending suit; 5) Sue the state in federal court for violating the constitutional rights of residents because of the quality of institutional care based on the facts testified to by these parents and employees; 6) Convince a judge to permit a class action suit by all residents living at the institution so that relief given to the named parties will be extended to every resident; 7) Begin discovery of all state records related to the institution and seek court permission to visit the institution at will; 8) Take photographs of the most awful conditions to be found or to be created by working-but-disgruntled employees; 9) Demand documents that are impossible for the state to produce; 10) Conduct motion sessions before a federal judge during which the state is accused of not dealing in good faith and of attempting to hide the horrible conditions it has created; 11) Report these events to the press.

This strategy of the civil liberties lawyers was used successfully at Willowbrook State School—the lead case in forced deinstitutionalization—and adopted in many other states because it created political pressure so great that the state eagerly entered a consent decree rather than litigating these issues. This decree, essentially a settlement agreement, was usually written by civil liberties lawyers, and generally called for two state actions subsequently enforced in court: rapid reduction of the census and the creation of extensive new community programs. Fearing that the governor would be perceived as callous if he rejected improvements for the mentally disabled, the state was initially manipulated into signing a consent decree and then forced into compliance with this agreement when it became a court order. Later the state discovered that the consent decree's terms, incorporating the ideal standards written by civil liberties lawyers, could not be met. Thus each state, whether under the same governor or a new one, found itself in constant contempt of court. Because few judges like to reverse or modify their own orders, there is constant litigation testing the state's performance action against the consent decree's ideal standards. And, of course, during this litigation the civil liberties lawyers hold the high ground, advancing the interests of the disabled, while the state agency that officially cares for the disabled appears to oppose better care.

Although hardly any state escaped a class action suit based on

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

some variation of this strategy by civil liberties lawyers, not all entered consent decrees; in fact today no state with good legal advice will sign a consent decree. Nor are the consent decree terms of later suits as idealistic as the earlier ones. Yet after a decade and a half, many consent decrees are still in place despite being battered by constant litigation and aging very poorly.

These years of judicial review at the state level have more recently yielded some unsympathetic decisions by the Supreme Court. And, experience gained through the actual application of liberty to the disabled through the creation of community-based care now teaches us that few state institutions will ever be closed, because such closings have profound unintended consequences.

A few institutions have been or will be closed in the near future as a result of the efforts of civil liberties lawyers and modern mental health workers. But these closures must be seen as an exception rather than the rule for two reasons: First, statewide mental health systems have found that they could consolidate institutional care by placing higher functioning individuals (who did benefit from the increased opportunity for liberty) in community care. Second, some of the institutions affected by consent decrees now cost so much—for example, 50 percent more per resident ($75,000) in New York State targeted institutions than in nontargeted ones ($50,000)—that states may be forced to close these institutions for financial reasons alone and distribute resources and residents more evenly throughout the remaining state institutions.

Unintended harm

Indeed, the great push for deinstitutionalization has reached its natural end. But what has it accomplished? There is no doubt that institutional care has improved in the nation's state institutions during the last decade and a half. And there is no doubt that the credit for this improvement rests to some degree with the civil liberties lawyers who mounted this vast effort. But something went wrong along the way. Careful analysis reveals that there has been too much harm done to too many individuals.

First of all, institutional residents, whose disability often prevents them from exercising genuine decisions regarding where they live, have been shuttled during this period by the tens of thousands from institution to institution and from institution to community. But has this mass exodus toward greater liberty actually increased meaningful decision making for the mentally ill and mentally retarded? Or has it, to the contrary, made the disabled the real victims of deinstitutionalization?

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

When clients of state schools and patients in state hospitals personally requested a discharge during this mass exodus, a move out of the institution may have been warranted. However, where patients and clients were coached by staff or simply could not, because of their disability, express any preference at all about where to live, a rather different set of circumstances arose. Not only was the exercise of decision making by proxy—the very act abhorred by civil liberties advocates—necessary prior to community placement, but at that very moment institutional residents became faceless statistics on the plaintiff's institutional rundown charts. The decision to transfer was often driven not by the long-term needs of the disabled individual but rather by the monthly target of new residents who would be introduced to increased liberty.

Two treatment philosophies, in effect, were in conflict: Was it in the resident's best interest to remain in a protected environment with familiar surroundings, with people he recognized and, more important, with people who knew and had cared for this individual, sometimes for decades, despite the admitted problems with institutions? Or should this resident, because of his interest in liberty, be transferred to a new, often unknown environment with new, inexperienced staff working for a newly formed private organization whose funds were unstable and whose managers were often untrained? The reasonable decision would have been to choose the new treatment philosophy only with great caution. But the other variable—the interest in liberty—weighted the decision with more idealism than reason.

What happened to the mentally disabled when they were torn from a social environment that was familiar and predictable to them and thrust into another that was new and unstable seems less of a tragedy when compared to what happened to the families of the disabled. As disabled individuals were transferred to the community, their families were suddenly forced into conflict with the state government and with other families. Overnight, parents were introduced to enormous uncertainty about the most important family event in their lives: the deep personal burden of bringing into the world and raising a disabled child. Each family found itself facing an agonizing decision, sometimes fighting other parents who were carrying the same enormous burden. Although they were frequently given a voice in developing treatment goals for their children—which effectively meant participating in the decision to choose a community placement—parents had no authority to veto this decision short of taking their child, who was more often than not an adult, home and assuming primary care responsibility.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Parents who objected to this strategy because they did not trust the new promises about community care were portrayed by civil liberties and modern mental health workers as being selfish. They were accused of resisting the "best interest" of their child and of expressing their own personal fears that their child, if he failed in the community, would be sent home. In contrast, parents who became advocates for forced deinstitutionalization were encouraged to form nonprofit organizations which received financing from the state to start up new community programs. It is fair to say that today the most vocal parents advocating deinstitutionalization are those who manage community programs or have some financial stake in their continued growth. Obviously a court or executive order stopping admissions to institutions creates a huge waiting list of exhausted (and traumatized) parents who can be recruited with promises of quicker placement for their children. And, of course, advocates exploited this opportunity.

The effects of playing one group of parents against another was and continues to be emotionally devastating for those caught in this warfare. Parents who become involved in discharge decisions are either put through a new emotional wringer when expressing doubts about the new approach to mental health care or are offered the dual reward of renewed hope for their child and of state financing for a business undertaking, which are inextricably linked for purposes of advocacy.

Parents choosing community programs are then subjected to the threat of annual budget cuts by state government. These threats in turn require their aggressive advocacy with state representatives to protect the financing of private community programs. In the case of parents connected to targeted institutions, the threat of budget cuts also requires expression of their children's success whether true or not before the court in order to bring judicial sanctions against cuts in community programs. In other words, the fragility of community programs during a period of limited state government funding creates a constant crisis for these parents. Inevitably, where this sort of advocacy emerges and where the stakes are both emotional and financial, the factual issues about deinstitutionalization become distorted. The harm to parents as a whole is inordinately severe, not just because a second injury arises from parent fighting parent but because the deinstitutionalization movement has left parents no room to find a middle ground.

Workers in state institutions were also deeply affected by forced institutional rundown. Many became involved in these cases to protect institutional based jobs from being cut by executive order. Iron-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ically, public employees working in state institutions fill what might be the most demanding government job. Yet they were confronted with the sudden elimination of tens of thousands of jobs, many held by people who had given decades of public service.

The remaining work force (and it is now clear that, with the exception of a few targeted institutions, a large but demoralized work force will remain for years to come at all state institutions) has been unable to focus on patient care as its first priority. Workers have been fighting deinstitutionalization for years, not only to justify their jobs, but because they believe in the kind of care they provide and feel that the sacrifice required to do the job well cannot be created in an unstable private sector. Direct care workers have been fighting both the press and state executives, who blame them for the conditions previously found in state institutions.

Yet society must still entrust to these workers the direct care of society's most disabled: Those who cannot be transferred to community care and must remain in state institutions. Civil liberties lawyers misunderstand the human dynamics that make for quality care in any setting. Effective workers must carry out their hands-on work in an environment that respects and supports them.

With a policy that attacks workers in state institutions, the state has turned upon itself in self-destruction. In the last decade, it has probably wasted more resources by creating a demoralized workforce than it appropriated through new federal and state funding. In fact, the entire lives of some disabled individuals have now been dominated by worker turmoil. And if the new community programs under contract with state government fail because of poor management and an unstable work force, which appears increasingly to be the case, then the state is left alone with no acceptable alternative to care for the mentally disabled. The best workers are being or have already been driven out of the state institutions.

Quality care in any residential setting rests, first of all, on the human relationships between direct-care staff and residents. The prototype for this, of course, is the relationship between parent and child. The prototype, however, is impossible to replicate between strangers, even with generous funding. Love and caring are not easy to buy and become even more difficult to create for disabled adults who cannot care for themselves and who show little or no real improvement over their lifetime. The workers who do this hands-on work, if they are to show caring, must be valued by state leaders. They must be able to work in a stable environment with a known group of residents about whom they can develop some knowledge and, it is to be hoped, some personal attachment.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

To devalue workers and to destabilize the institutional work environment is to break the fragile bond between worker and resident. It is not easy to do the work of caring for severely disabled individuals. As one New York State official told a judge when chastised for not meeting a target of increased numbers of state workers, it is not easy to find people willing to change diapers on grown men. The assault on state workers was more than an economic loss for those who lost jobs, it was also an unintended assault on the residents who remained in every institution. Yet the image of harm caused by state workers is now deeply embedded in the public's mind as well as reflected in state policy. This image could not be more wrong. It violates the property interest workers have in their jobs, it destroys the years of experience many workers have gained from different institutional jobs, it harms the quality of care in institutions by destroying the real caring that does occur there, and with all of this it wastes public resources.

Losing control

The inability of state governments to manage their resources is another far-reaching effect of forced deinstitutionalization. States lost control over the single largest item in their budgets—care for the mentally disabled. Annual expenditures are now made on an irrational basis, often shaped simultaneously by courts and advocacy groups with huge financial stakes in allocation decisions. The publicly financed but privately delivered system is the tail that daily wags the dog because in many states it is now larger than the public sector.

Further, the federal pot of gold so forcefully sought by state government under Medicaid, Medicare, SSI, and SSDI distorted the decisions that were made for the mentally disabled. Vast new expenditures medicalized and professionalized services that should have been more informal, long-term care services. Then, because of federal cutbacks, these programs were stripped of professional staff. Even before penalties from some federal programs (a $56 million grant for Medicaid-supported Intermediate Care Facility/Mental Retardation programs was disallowed in 1984 because the state of New York failed to carry out the provisions in a five-year plan to run down and close its state institutions) major private providers simply went bankrupt.

The state created small community residences in a private sector that promised to provide better care at lower costs, but many of these community facilities seem to have a rather short half-life. The rapid turnover of staff, poor management, and costs that now appear

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

equal to or greater than institutional care (one study done by this author determined that a state institution bed in Manhattan cost $50,000 a year, while the equivalent bed in a community facility cost $130,000 a year), raise questions as to the future of community residences.

Under permament crisis conditions, state policymakers are simply unable to ask tough questions about the stability and viability of these private agencies over the next decade. Problems are largely hidden from view (unlike in large institutions where there are lots of eyes) and, except in rare circumstances, the state is unable to penetrate into private agencies to observe the day-to-day quality of life experience there.

The responsibility for effective management of these programs is delegated to the executive branch by each state legislature. Today, there is growing concern that too much executive authority has been taken away from state government by federal judicial review. However, state executive authority, a prerequisite for effective management, has not only been directly reduced by judicial review, it has also been indirectly weakened by the court's preference for the private sector, which has grown enormously as a result of litigation. Thus, state government must also be considered one of the victims of forced deinstitutionalization.

Finally, local government has been severely affected by deinstitutionalization. Indeed, the burden flowing from this policy may be one of the most serious unresolved problems facing cities across the nation. Beyond the increased financial demands placed on local governments by discharged institutional residents, local governments have struggled to solve problems of where to place the community care facilities and how to deal with the homelessness of many of the newly deinstitutionalized.

New York City may be the most dramatic example. It must provide a cot, a shower, and a warm meal for nine thousand individuals each night at its publicly run shelters. According to Robert Hayes, the attorney for the Coalition for the Homeless, twenty thousand individuals reject these shelters every day and instead choose warm vents, tattered cardboard partitions, and a dirty blanket roll for their night of rest in the city's public places. Less visible to New York City residents, another group of several thousand adults, some of whom are also disabled, and their children live in "hotels" supported by local government. The number of homeless individuals in New York City alone is estimated to be over thirty-six thousand with 30 to 60 percent of them mentally disabled.

The responsibility in practice for the care of these individuals

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

now rests with local government. Yet local officials believe that responsibility should be lodged in the state, which failed to follow up many of the former residents when they were transferred from state institutions to the community. They argue that many of the homeless would now be in more controlled environments had not states been forced to reduce the numbers in their institutions in such an uncompromising and hurried way. In the minds of most officials in New York City, there is no doubt about the cause and effect relationship between the one hundred thousand beds that were emptied within New York State's forty institutions during the last two decades and the people now living on the city's streets.

This is only part of the burden on local government. Children living at state institutions when class action suits were initiated and children on the waiting list when admissions were closed became the responsibility of public schools. Thus, the responsibility of local government now includes the provision of residential care as well as day programs for these individuals.

Local education boards did not (and still do not) have the specialized professionals required by these disabled children, especially in the smaller school districts. Further, when these children turn twenty-one, local government no longer has either financial or legal responsibility for them, thus triggering another hasty move for disabled individuals, one totally unrelated to individual needs.

Liberty at a price

Powerful social forces converged to make deinstitutionalization attractive. The romantic idea of community, bursting forth in the 1960s, created a vision that affected our judgment. And the desire to "teach the retarded" and "cure the mentally ill" is so deeply embedded in our psyche that hope generated by community programs took on a life of its own. And the rapid economic expansion from the mid-1960s to the mid-1970s did create a new political infrastructure (community-based professionals and private local delivery systems) that came to dominate public decision making. Finally, the marriage between conservatives at the state level who thought money would be saved in the long run by closing institutions, and liberals who hoped to improve services by closing state institutions continued until deficit spending threatened to bankrupt both state and federal government.

We must now ask what values are still advanced by further reducing the numbers in state institutions, whether by state policy or judicial order. Does the idea of liberty, when thrust into the lives

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of the mentally disabled, yield benefits that outweigh the harm caused by the destruction of the state's *parens patriae* authority, the demise of its institutions, and the harm to its residents, to their families, to workers, and to the ability of state and local governments to manage its human service organizations?

To answer this question we must distinguish the liberty interests that are advanced for the mentally ill from those liberty interests advanced for the mentally retarded. The interest advanced for the mentally ill is their freedom to make decisions about their lives, whereas the interest advanced for the mentally retarded is principally their freedom from physical restraint. But what kind of liberty do the mentally ill and retarded actually gain? Ideally liberty frees individuals from control or restraint by government. With increased liberty disabled individuals are empowered to make unrestricted decisions and to act as they see fit. However, in practice many mentally disabled people only partially exercise—if at all—the rights that fall under this liberty.

What is the meaning of this increased liberty if the retarded individual must be fed, clothed, directed in movement, and toileted by others whether living in a two-hundred-bed institution or a four-bed apartment? What is the meaning of this liberty if the mentally ill individual's "decisions" are merely an innate instinct to eat when starving or to find shelter when freezing, rather than the ability to increase personal self-control or self-care?

For the severely and moderately disabled, where substituted decisions continue in all daily living activities despite the change in residence, the benefits, if any, are minimal. Where the critical decisions about life—such as where to live and work, when to eat, and what to wear—cannot be exercised because the individual is too disintegrated, there is in practice little benefit from liberty.

The tragedy of deinstitutionalization stems not from the idea of liberty itself but from its extreme application to all disabled individuals irrespective of their disability. What remains to be determined is exactly where the scales are in balance, that is, where the benefits of liberty to the mildly disabled are sufficient to balance the harm caused by deinstitutionalization.

When the Supreme Court decided *Youngberg* v. *Romeo* in 1982, it settled many questions about the constitutional rights of the mentally disabled. The Court held that the state has a duty to provide adequate food, shelter, clothing, and medical care to the residents of its state institutions. Furthermore, the state has a duty to provide reasonable safety, freedom from undue bodily restraint, and mini-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

mally adequate training—apparently at the level of self-care skills exercised when residents entered an institution—when they are unable to exercise free movement and safe conduct for themselves.

However, the most far-reaching aspect of *Romeo* was not its definition of a basic level of care (because most state institutions in the 1980s already met this standard), but rather the *process* by which disputes about the adequacy of care in future cases will be decided. The state and the decisions of its professionals about minimally adequate training are now presumed to establish the standard of care. After *Romeo*, the question of liberty no longer offers grounds for an adversarial review of professional decision making as long as it falls within "acceptable professional conduct" as defined by the state.

The states are gradually resuming the right to make decisions under the power of *parens patriae*. While *Romeo* was being decided by the Supreme Court, a New York district court ruled for the plaintiffs after a twenty-eight-day trial during which the state had unsuccessfully attempted to modify provisions of the Willowbrook consent decree, one of those that had not aged well. But on appeal, the Second Circuit reversed the district court's decision and remanded the case back on the question of whether the views expressed by the state's experts as to this modification in the consent decree constituted professionally acceptable choices or, in the words of *Romeo* (which had now been decided), were "such a substantial departure from accepted professional judgement, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." After *Romeo*, a federal judge was no longer free to choose between the different views of the plaintiff's expert witnesses and those offered by the defendant-state. Instead, a presumption had been extended to the state's professional judgment (that of substitute "parent" for the severely disabled), and unless this decision was a substantial departure from accepted professional judgment, it stood unmodified by interests in liberty.

A second but probably more significant decision based on *Romeo* occurred in 1984, when the Second Circuit decided *Society for Good Will to Retarded Children* v. *Cuomo*. In this case the Second Circuit vacated a district court's order because it had entered too far as a federal court into the domain of state government decision making. The district court had ordered that 400 of the 1,221 residents living at the Suffolk Development Center (SDC) in New York be placed in community residences, ruling that institutional residents have a legal right to live in a setting that was least restrictive of their liberties.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Second Circuit reversed this decision because: "we may not look to whether the trial testimony established the superiority of a least restrictive environment in general or of community placement in particular. Instead we may rule only on whether a decision to keep residents at SDC is a rational decision based on professional judgment." A second reason for vacating the district court's order was also based on *Romeo*. The Second Circuit found that SDC residents were "not unduly restrained by residing at a state institution."

Romeo has stopped forced institutional rundown and greatly reduced adversarial decision making. No state is now likely to enter a new consent decree requiring institutional rundown; a state's hand as a potential defendant in a threatened federal court action is enormously strengthened by the return of the doctrine of professional paternalism and *parens patriae*. Furthermore, as the SDC reversal points out, even where a federal court chooses to require the highest levels of minimally adequate care, its orders will be directed to institutional improvement, not institutional replacement.

There is now an opportunity for states to regain control of executive decision making and to reduce the amount of litigation. Such control could not be more timely as each state attempts to respond in a humane way to the enormous new difficulties arising from decreased funds, and most importantly, attempts to redress the consequences of forced deinstitutionalization.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Our graying suburbs: solving an unusual housing problem

IRVING H. WELFELD

AT A TIME when housing policy has been focusing on low-income families who are living in poor-quality housing or paying more than they can afford, it is not surprising that little attention has been given to a group that is getting "too much" housing—elderly homeowners. Although they appear to be among the best-housed segments of the population, many of our elderly often find they have more housing than they need or can adequately maintain. This fact is not only a source of difficulty for them, it also creates a new housing dilemma for another segment of the population. The problem results from the reluctance of the elderly, many of whom have purchased their own homes and paid off their mortgages, to relocate, thereby closing off a significant portion of potentially available housing to a new generation of prospective homeowners.

A recent article in the *Wall Street Journal* entitled "Suburban Population Ages, Causing Conflict and Radical Changes," summarized the issue as follows:

> The aging of suburbia is causing radical changes in the character and politics of countless bedroom communities. It is leading to school closings, property-tax revolts and demands for . . . services for the elderly. Few suburbs are prepared to meet the needs of an older population. Subdivisions of single family homes sprang up like crab grass outside major cities after World War II, and their towns' zoning laws and institutions catered to households with young children.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

This situation is creating problems on the American housing scene for the opposite end of the age spectrum—young families with children. The high cost of housing has priced many young families out of the homeownership market. To make matters even worse, many landlords have decided that they do not wish to cater to families with children. A 1980 study for the federal government revealed that one-quarter of the nation's rental units banned children entirely, and an additional 50 percent limited them by number, age, or other factors.[1] The explosive growth of single-parent households (to approximately seven million), the popularity of adult-only complexes, and the shortage in some communities of affordable rental housing would suggest that the problem is growing.

By contrast, the elderly have the highest rate of homeownership in the nation. Eighty percent of households in the fifty-five to sixty-four age group are homeowners; 77 percent are homeowners in the sixty-five to seventy-four segment; and 72 percent of those over age seventy-five own their homes.

Clearly something has to be done to alleviate what appears to be a housing gridlock. The key element would be a subsidy that would somehow entice the elderly to move to smaller units by providing them with a lifetime guarantee that their housing costs will remain within their economic means. The attraction of this subsidy is that it is directed at the costs of relocating to and maintaining a new, smaller home. Indeed, many of these elderly people remain homeowners for economic reasons. As one observer wrote, "Few better alternatives exist that would not result in a major increase in the proportion of income consumed by housing costs."[2] In a substantial number of cases—either because of indifference, poor perception of maintenance needs, or economic inability—the homes fall into disrepair. This depreciation of property serves no one well. In addition, the usual house is designed for larger, younger families. As a result, the elderly often underoccupy shelter that is ill-designed for their present use, while in some locations younger families are crowded into apartments unsuited for raising children.

The condominium subsidy program described here would help solve both of these problems while at the same time minimizing the cost to the government. The program would be open to all elderly households who elected to move into condominiums and live there

[1] Robert W. Marans and Mary Ellen Colten, "U.S. Rental Housing Practices Affecting Families with Children: Hard Times for Youth," in *Housing Needs and Policy Approaches*, William van Vliet, et al. (Durham: Duke University Press, 1985).

[2] M. Powell Lawton, "Housing Problems of Community Resident Elderly," p. 3 (Draft paper prepared for the Conference on Housing of the Independent Elderly sponsored by the HUD Office of Policy Development and Research, December 16, 1977).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

for at least nine months of the year. A condominium arrangement (whether a high-rise, a garden-type, or a townhouse development), is well-suited for occupancy by the elderly because each household owns its unit and a proportionate share of common space. The resident is free both physically and fiscally. He is free from mowing the lawn and raking the leaves and he is free to make mortgage arrangements that suit his particular situation. The program in some areas would merely reallocate existing housing in a way that accommodates the desires of both the old and the young. In other areas it would increase housing production at a relative low cost and, thereby, eliminate the need for building large, high-cost units for younger households.

How to do it

The average value of an elderly couple's home in 1983 was $52,300; for the elderly single, $49,200. The median value of a four-room owned unit (most likely a condominium) was $37,800.[3] In areas in which the costs of condominiums are high, it is likely that the value of the homes would also be high. In the typical case, however, the household could purchase the unit from the proceeds of the sale of its home and be left with a few thousand dollars pocket money. The subsidy suggested here would guarantee that this surplus would not be eaten up by the maintenance costs of the new condominium.

The traditional way of providing subsidies to homeowners is through the provision of subsidies that either lower the downpayment or the monthly debt service payment (either through a capital grant or an interest reduction subsidy). A subsidy format that concentrates on the mortgage is appropriate for young, asset-poor families with good future income prospects. It is obviously inappropriate for asset-rich households with poor future income prospects.

The subsidy in the proposed condominium scheme would be tied to the nondebt service components (that is real estate taxes, insurance, and operating expenses) of housing cost. It would be paid only when these maintenance expenses exceed 20 percent of household income, and would be limited to the amounts in excess of 20 percent. Thus, the program would protect elderly owners from increases in housing costs that were not matched by increases in income. And, unlike the reverse annuity mortgages, schemes by which owners draw down the equity of their homes in monthly installments, there is no danger that owners will "outlive" their equity and be forced to

[3] Census/HUD, *Annual Housing Survey: 1983, Part C, Financial Characteristics of the Housing Inventory*, Table A-2 (1985).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

repay the loan with interest out of what may be by then quite limited resources. This condominium program assures the elderly household that it will never have to invade the principal of its home in order to cover its housing costs.

A condominium is suitable for a nondebt service subsidy since there can be independent verification and checks on operating costs. The monthly condominium fee provides a convenient measure of the expenses to be subsidized while the existence of other owners, who will not necessarily be subsidized, provides a check on costs. To further ensure that owners do not take a free ride on maintenance costs, the subsidy could be limited to, for example, 50 percent of the first $1,000 of nondebt service costs, 25 percent of the second $1,000, and 10 percent of any amount over $2,000, up to a level to be set by regulation. The maximum subsidy for a unit with nondebt service expenses of $2,400 would then be $790 ($500 [50 percent of the first $1,000] + $250 [25 percent of the next $1,000] + $40 [10% of the remaining $400]). The monthly median operating cost for new units with no mortgages in 1983, in the United States, was $170 per month ($202 per month within metropolitan areas). The median size of these new units was 5.2 rooms.[4]

Table I shows subsidy payments for households at various levels of income and operating expenses. The median income of elderly households is approximately $10,000. The table assumes incomes of $6,000, $8,000, $10,000, and $12,000. Annual nondebt service costs are assumed to be either $1600, $2000, $2400, or $2800. From these figures we can see that the subsidy program as it is designed meets the twin goals of hedging against high costs for the elderly while keeping the overall program inexpensive from the point of view of the government.

Cost vs. efficiency

For some people, the program would supplant existing subsidies; the cost to the government would be far lower. An elderly household with an income of $8,000, for example, qualifies under current programs, such as public housing or the special elderly segment of the Section 8 program that relies on new construction, for a subsidy that often exceeds $6,000 per annum. Under the proposed program, if we assume a case in which the nondebt service were $2,200 a year, the household would receive a subsidy equal to the lesser of $600 ($2,200 – $1,600 [20 percent of $8,000]) or $770. The

[4] Census/HUD, *Annual Housing Survey: 1983, Part A, General Housing Characteristics*, Table A-4 (1984).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Table I. Estimated Subsidy Payments for Operating Costs and Utilities
(By Income Class)

Income	*Operating Costs*	*Maximum Subsidy*	*Actual Subsidy*[a]	*Subsidy/Cost (Percent)*
$12,000	$1,600	$625	$0	0
	2,000	750	0	0
	2,400	790	0	0
	2,800	830	400	14
10,000	1,600	625	0	0
	2,000	750	0	0
	2,400	790	400	17
	2,800	830	800	29
8,000	1,600	625	0	0
	2,000	750	400	20
	2,400	800	790	33
	2,800	1,200	830	30
6,000	1,600	625	400	25
	2,000	800	750	38
	2,400	1,200	790	33
	2,800	1,600	830	30

[a] The lesser of (costs – 20% of income) or (50% of the first $1,000 of costs, 25% of second $2,000, and 10% of amount in excess of $2,000).

subsidy cost would be a fraction of the present cost to the government of subsidizing the household.

There are approximately seven million elderly households (sixty-five years or older) with incomes between $5,000 and $12,500.[5] A program covering one hundred thousand units, assuming an average annual subsidy of $600, would cost $60 million a year. Unlike present subsidy programs, the subsidy would have accomplished its purpose once the moderate-income elderly family moved and there was a reallocation of old space or possibly a production of new space. The subsidy, therefore, ceases when the initial household moves on, or passes on. If we assume an average tenure of ten years, the total cost of the program would be $600 million.

The United States over the past decades has been burdened with multibillion dollar housing programs. To take an extreme example, the subsidy cost per unit per year for a four-room unit to be built in Manhattan in 1986 will be $12,000 or $360,000 for the thirty-year life of the program. A program of equivalent size to the one proposed would cost $36 billion.

There is an extra noneconomic benefit that will affect the well-being of the elderly. A number of noted gerontologists have studied

[5] Census, *Current Population Reports, Consumer Income, Money Income of Households, Families, and Persons in the United States: 1981*, Table 10, (1983).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the reaction of a group of elderly who voluntarily moved to smaller units. They found:

> The effect of dwelling-unit size was always such that *smaller* size was associated with improved well-being. It is probable that the most favorable moves were those from large units in unfavorable settings to smaller ones in improved settings.
>
> In addition, this finding suggests that there may have been something satisfying to the competence needs of these residents in reducing the size of the dwelling and concomitantly the demands on their energies.[6]

The fairness factor

Since the Office of Management and Budget's present mission is to search for demerits in any program that has any dollar figure connected with it, it will carefuly scrutinize this program using its standards of efficiency and equity. A cheap program is not necessarily an efficient one. If some of the households receiving the subsidy would have moved to smaller condominium units even if there were no subsidy, each dollar spent would produce less than a dollar in benefits. The number of households that will fall into the latter category is an issue of program design and conjecture. Although the program is not targeted to the needy elderly, an income limit would ensure that the critical factor in the move would be the "possibility" of a subsidy payment. An income limit of approximately $12,000 or 120% of the locality's elderly median income level would seem to be a level at which the subsidy would make a difference to stay or move. The word possibility is in quotation marks to indicate that the receipt of a certificate and the receipt of a payment are not synonymous. Department of Housing and Urban Development (HUD) program officials are well aware of the number of needy certificate recipients who are unable to find a unit suitable to HUD and who, therefore, never receive a subsidy.

The condominium program presents a different scenario. The elderly homeowner sells his home and moves to a condominium because he has a lifetime federal limited guarantee as far as housing costs. It then turns out that because his income did not decline as quickly as he expected or housing costs did not increase as quickly, the subsidy is never used or only used during the later years of the household's tenure. The government would have, then, a situation in which there would be more than a dollar's worth of benefit for every dollar expended. In addition, there are benefits to the young

[6] M. Powell Lawton, Elaine M. Brody, and Patricia Turner-Massey, "The Relationship of Environmental Factors to Changes in Well-Being," *The Gerontologist*, Vol. 18, No. 2 (April 1978), p. 137.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

households who are able to obtain homes and also savings to local governments (and the federal treasury) who need not float bonds to build up-county roads, sewer facilities, and schools at the same time that down-county schools are being closed.

Is it fair? Can we justify a program that is not directed to the neediest? There are two "Washington" justifications and one correct one. It can be argued that the proposed program is certainly no worse than "tax subsidies" to homeowners or that the elderly are to be accorded special treatment. These justifications assume that the poorest elderly (or for that matter, moderate-income young couples) can only be helped by programs that are aimed directly at them. They also wrongly assume that this condominium program is meant to replace programs that are directed at poor renters. A reallocation of housing will help young couples looking for homes and poor renters looking for apartments. The loosening of the market will transform certificates from possibilities into leases. The "elderly" are not a homogeneous group. There is a world of difference between the fifty-eight-year-old "empty-nester" and the eighty-five-year-old nursing-home patient. One program cannot address all the needs and concerns of the group. All sorts of housing options covering ownership as well as rental are needed, ranging from shared housing to maintenance assistance for poor elderly homeowners.

First come, first serve?

Since the elderly condominium is not a universal subsidy program, how will the recipients be chosen? Once the subsidy is allocated on a geographical basis, how do we choose recipients when the program is only tangentially based on need? The main objective of the program is a better use of the nation's housing inventory; the benefit given to the elderly household is incidental to the program. The subsidy recipient is given a subsidy because of the country's, rather than his, need. If homeownership and a moderate level of income are the only criteria, can we do better than allocating on a first-come, first-served basis?

Yes, at least in a financial sense, if the commitments were auctioned. Who would want to take over the government's role? Who would want to pay good money? The answer is persons who could make more money or have a greater benefit than the cost of their bid, for example, real estate brokers, builders, and the children of eligible parents. The real estate broker, ever eager to have a leg up on the competition, will be buying a better chance of closing a deal. He will have an answer to the question posed by the elderly pros-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

pect, "Where will I live if I sell my house and will I be able to afford it?" The broker, because of the availability of a lifetime guarantee of affordability, can allay the latter fear. The bottom line is the possibility of two commissions. A 7 percent commission on the sale of a $50,000 home and a 7 percent commission on a $40,000 condominium is something worth paying for. It is especially attractive to nationwide real-estate networks since they can show the elderly not only local alternatives but also alternatives in other and perhaps warmer climates. The fact that the holder of the commitment is a person or a firm that has put up cold-cash guarantees assures that a strong effort will be made to publicize the program.

Builders or owners of buildings that are undergoing conversion (or even investors who may own a block of condominium units) will also be interested in a program that could provide their apartments with a unique feature. It makes far more sense to buy a commitment for $3,000 than to slash the price of an apartment by $5,000.

The purchase of a commitment by the middle-age children of an elderly couple could buy peace of mind for the elderly couple and for the children. For the price of a four-week vacation in Arizona, the "kids" could provide their parents with a lifetime of carefree housing (and for the more mercenary guarantee that their inheritance not be dissipated). The commitments would be negotiable. There is no reason why a broker shouldn't be able to sell to a builder. Even if the parents do not want the condominium, it could be transferred to someone who would use it. Since these commitments are meant to be more than speculative items, there would be a one-year or two-year time limit (or shorter with renewal for a fee) on the use of certificates.

The federal government's role would be limited to consumer protection. HUD would have to provide the subsidy recipient with a brochure explaining the program, and a face-to-face meeting would be required between HUD (or an approved counselor) and the recipient before he sells his home. The building into which he moves would have to meet HUD or local minimum standards, be in a moderate-cost range, and have a management scheme that is fair and reasonable (for example, no recreational leases). The recipient would also be informed that the operating costs are limited to traditional housing items and would not include such items as health-club fees.

Such a proposal would certainly not meet all the demands of those legitimately in need of housing assistance. But, of course, that is not its intention. The proposal is unusual in that it seeks to accomplish some worthwile objectives by a reallocation of resources rather than through subsidies.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Cleaning up Superfund

MARC LANDY

THE SPECTRE OF CANCER haunts our imagination. Nowhere is this obsession more evident than in the debate over what to do with abandoned hazardous waste dumps. Many of these sites have been found to contain chemicals identified as carcinogens and the battle to clean them up has become, in the public mind, a vital part of the war on cancer.

Despite public certainty of the threat of waste dumps, there is widespread disagreement within the scientific community about how much health risk these dumps actually create. The available evidence does not substantiate fears that a cancer epidemic is underway.

In the laboratory, carcinogenicity—the potential of a substance to cause cancer—is established on the basis of experiments conducted on animals. These small animals, which have a short life span, are given large doses of a suspected carcinogen over a brief period of time. The exposures, which result from the leaching of chemical waste at a dumpsite, involve a large animal, man, coming into contact with minute quantities of those substances over a long period of time. There is, as a result, no agreement among leading authorities over whether results from laboratory tests can be applied to human exposure to chemical waste sites. In short, there is no conclusive evidence that toxic dumps are causing a cancer epidemic.

Nevertheless, the possibility that evidence of greater risk may emerge in the future cannot be ruled out. A recent controversial

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

study conducted in Woburn, Massachusetts, shows elevated levels of leukemia occurring among those who obtained their drinking water from a contaminated well. But the precise pathways by which toxic materials move from such sites through the groundwater and into water supplies are poorly understood. It may be that it takes decades for the hazardous substances to reach reservoirs and wells. Moreover, some forms of cancerous tumors have long latency periods. This combination of delayed contamination and long latencies might mean that, in some cases at least, many years must pass before the actual onset of disease. Such delays make the evaluation to health risks more difficult and make it necessary to continue research and encourage more careful waste disposal practices.

But the federal government has, it seems, abandoned such a moderate course. In 1980 it instituted Superfund, a "crash" cleanup program, before any reputable evidence of health danger had even been presented. Currently, efforts to expand the program are being made despite continued uncertainty about the seriousness of the problem and the ability of the program to cope with it.

The enormity of the federal deficit notwithstanding, support for the expansion of Superfund has managed to span partisan, ideological, and institutional divisions. The current funding level is $1.6 billion to be spent over five years. The President sought slightly more than a threefold increase. Congress would expand it by more than $8.5 billion. (As of this writing, Superfund reauthorization is stalled in Congress because of the inability of the House and Senate to reconcile their differences about what sort of taxing scheme to use to finance it.) This extraordinary popularity reveals less about the nature of the cancer menace *per se* than about the temptations to which government is liable when it confronts uncertain risks, technical ambiguities, and public hysteria.

There is little doubt that support for Superfund stems directly from the fear of the spread of cancer—a fear that the Environmental Protection Agency (EPA) may have exacerbated in its attempt to get the Superfund Act passed. But Congress has responded to this public outcry by producing a program that misguides the public about the nature and magnitude of the risks it faces, and encourages state and local officials to act irresponsibly.

Panic at Love Canal

To appreciate the atmosphere in which the Superfund program was conceived we need only look back at the 1978 Love Canal episode, which crystallized public concern over the problem of aban-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

doned waste sites. Located in Niagara Falls, New York, this site was originally a canal which had been used by the Hooker Chemical Company to dispose of chemical wastes between 1942 and 1952. It was then covered with earth and clay and deeded to the local school board for use as a school and playground while the vacant land bordering the canal was used to build modest single family homes. In the mid-1970s, Love Canal residents began to notice the discoloration of their lawns and basements. Some reported an increase in illness and emotional distress. In August 1978, the New York State Health Department declared the area to be a public health emergency. Residents were advised to stay out of their basements and avoid eating vegetables from their gardens. Pregnant women and families with children less than two years of age were urged to temporarily move away. In September 1978, the health department issued a report entitled "Love Canal: Public Health Time Bomb" describing the situation as an "environmental nightmare" which constituted a condition of "grave and imminent peril."

Neither the declaration of emergency nor the grave tone of the report were based on any evidence of site-related illness. In fact, no such evidence existed. Rather it seems that the choice of such extreme language used in the report was dictated by legal and fiscal exigencies. In order to obtain funds for health studies, state law required a finding of "grave and imminent peril." Similarly, in order to make Love Canal eligible for federal disaster aid, the health department had to claim that an emergency existed. The department appears not to have considered the impact its declarations would have upon a wider public.

The report's sensational language, coupled with the excellent photo opportunities presented by mauve lawns, chartreuse basement walls, and irate residents, aroused the news media from its late summer torpor. Love Canal became the leading national news story for days on end. In the following months, documentaries appeared on the networks, *Time* did a cover story, and Jane Fonda paid a tearful visit.

Fears were further heightened by the release of scientific studies purporting to show that serious health damage had occurred at Love Canal. Dr. Beverly Paigen, a cancer researcher at Roswell Memorial Institute in Buffalo, had served as a consultant to the Love Canal Homeowners Association since 1978. In March of 1979 she appeared before a congressional committee and presented findings of increased rates of miscarriage, birth defect, nervous breakdown, and disease of the urinary system. In May of 1980 the *New*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

York Times reported that a study conducted by a Houston-based research laboratory, Biogenics, under contract to the EPA, had detected elevated rates of chromosome damage among those living close to the canal. This finding set off a new shockwave of publicity. From the middle of May 1980 to the middle of June of that year, Love Canal was virtually a daily component of network newscasts. It was also featured on *Today*, *The MacNeil-Lehrer Report*, *Sixty Minutes*, and *Good Morning America*. Phil Donahue devoted a full hour to the story, busing forty residents of Love Canal and the mayor of Niagara Falls to Chicago for the taping.

Soon after, doubts about the scientific studies began to emerge but the fear and concern which they had done so much to create remained. On June 4, 1980, Governor Hugh Carey of New York established a panel to review the scientific studies relating to Love Canal. It was chaired by Dr. Lewis Thomas, a noted researcher and writer and chancellor of the Memorial Sloan-Kettering Cancer Center, and included four prominent research physicians. In a report issued in October 1980, the panel dismissed Paigen's work stating that "it could not be taken seriously as a piece of sound epidemiological research." Her findings were based upon questionnaires she had submitted to "a narrowly selected group of residents." She had not devised adequate controls nor had she taken steps to medically validate the claims of illness made by her respondents.

The panel labeled the Biogenics study "botched and misinterpreted." It pointed to the use of chromosome damage levels to establish a public health risk, a methodology the panel found dubious. In fact, no clear evidence exists associating chromosome damage with many of the conditions allegedly present at Love Canal. Chromosome damage is actually quite a common condition, and can even be caused by ordinary aspirin. This makes it especially difficult to determine whether or not a particular subpopulation's chromosome damage level is in fact excessive. To do so requires that the match between the test and the control group in terms of age, sex, medical history, geography, and other relevant variables be as close as possible. Instead, the Biogenics study compared the evidence garnered from thirty-six residents of Love Canal to data obtained from an earlier study conducted on a different population for an unrelated purpose.

Superfund spillover

These developments occurred at a propitious time from the standpoint of the EPA. Sensing a decline in public and congressional sup-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

port for its ecologically oriented programs, the agency was seeking to emphasize its role as a cancer figher. At a briefing outlining the agency's 1979 budget plan, an EPA administrator, Douglas Costle, announced that the "EPA is now a preventive public health as well as an environmental agency." He then proceeded to mention "health" six more times. An aide revealed that air, water, and solid waste programs had been refocused on toxic and hazardous materials, and that funding for ecological research had been reduced in order to expand research on human health effects. Rather than viewing public concern about hazardous waste sites as a burden to be borne by an already overcommitted agency, the EPA's desire to expand its health responsibilities caused it to view the public furor over Love Canal as an opportunity to increase its resources and its scope of responsibility. The EPA worked to fan the flames of concern. Field personnel were encouraged to go out and find new sites and to make sure that both the press and the local congressman were informed of those discoveries. It also began formulating legislation which would give it the lead role in cleaning up abandoned sites.

This proposed legislation empowered the EPA to devise a list of the nation's worst sites and to pay 90 percent of the cost of cleaning them up in the event that no liable party could be found. The states were required to pay the other 10 percent. The program would not be paid for by general revenues, but rather by a special tax on chemical feedstocks—the basic chemical compounds necessary for most manufacturing processes. This package accomplished several of the agency's important goals. It provided entree into what was obviously going to be a public policy growth area and one which was very much in keeping with the new "public health" image which it was seeking to project. And it provided a source of revenue which was secure from the vagaries of the congressional appropriations process. Unfortunately, the package was less complete in terms of its ability to address vital questions of less immediate concern to the agency: questions involving the education of the public, the promotion of civic responsibility, and the efficient allocation of public resources.

The public case for the feedstock fee system was not made on the basis of its insulation from the annual congressional authorization process. Instead, the agency touted it as a way of making the chemical industry pay for the program. However, as the EPA's own data revealed, the chemical industry would not absorb the fee, it would simply pass it on to consumers of chemical products.

Ironically, the chemical industry vociferously opposed the fee.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Although it possessed the same economic data as the agency, it too chose to perpetuate the illusion that it would be "stuck" with the fee. In reality, it opposed the fee on public relations grounds. It feared that to be singled out to pay a special tax would create the impression that the chemical industry was somehow to blame for the problem, a conclusion which it vigorously denied. In this way the industry joined its antagonists in abetting the misconception that the public would not have to pay for cleanup.

The gravest weakness of the EPA proposal is that it provided no method for determining spending priorities. Since the size of the fund would be limited, the agency would have to concentrate on a relatively small number of sites. A ranking system was developed in order to select the nation's worst sites, but the law did not mandate that the sites with the worst scores receive priority attention nor did it provide an alternative means for deciding which ones should be tackled first.

The package, moreover, provided no real guidance for determining what level of cleanup was to be attained at a particular site. A wide range of methods would conceivably be deployed at a given locale, each of which would provide some level of protection to the public. For a few thousand dollars, a fence could be erected and a "Danger—Keep Out" sign posted. Or, at a cost of millions, all the contaminated soil could be removed and a complex ground-water filtration system built. In order to choose between such diverse alternatives, *someone* would need to decide "how clean is clean."

Those who drafted the EPA proposal surely were not oblivious to the importance of these matters. However, they realized that comparisons of the risks posed by different sites and of the cost effectiveness of different remedies presupposed the availability of data which did not exist and of methods of inference which had not yet been established. Only by keeping these questions out of the policy debate could the agency hope to make its case for an aggressive program to defuse "ticking time bombs" without revealing that it had no idea how destructive they really were, nor what level of spending was required to render them harmless.

Congress devoted considerable time and attention to Superfund. It was the subject of deliberation of four different committees of the House and two of the Senate. The issues which received the most careful attention were those pertaining to the size and incidence of the feedstock fee and the nature of the liability scheme. The fee was approved only after the EPA produced a study conducted by Data Resource Inc., a Massachusetts consulting firm, showing that this

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

new levy would neither do substantial harm to the chemical industry as a whole, nor affect the competitive balance within the industry.

The EPA draft contained a provision calling for strict joint and several liability. Strict liability implies that plaintiffs need not prove that defendants are negligent. The defendant is liable regardless of the care exercized to prevent harm. Joint and several liability implies that all defendants can be held liable for the full adverse consequences of their joint actions. The plaintiff does not have to demonstrate how much each defendant in particular contributed to the harm. Congress modified this scheme to provide certain defenses against it which fit with common sense notions of equity. But scant consideration was accorded to the issues of priority setting and resource allocation which the EPA draft had ignored. The final versions which President Carter signed into law in November of 1980 closely resembled the original draft which the EPA had proposed a year earlier.

"Time bomb" at Times Beach

The problems resulting from this congressional abdication were demonstrated by the Times Beach episode, the most widely publicized "time bomb" to be unearthed since Superfund's passage. In the absence of clear-cut legislative guidance, government officials fell victim to two of the worst maladies of modern executive decision making: overreaction to adverse publicity, and support for the pretense that political decisions are being made scientifically.

Times Beach is a small Missouri town, twenty-five miles west of St. Louis. In the summer of 1972, its unpaved roads were sprayed with oil in order to keep the dust level down. Unbeknown to the townspeople, the waste oil used for spraying contained dioxin. The situation went unnoticed for a decade. In 1982 dioxin contamination was found at several horse stables whose indoor exercise arenas had been sprayed with contaminated oil by the same contractor. A check of his records led EPA investigators to Times Beach. Residents were startled to see EPA technicians appear wearing gloves, respirators, and plastic suits to pick up soil samples from the very streets which they travelled on every day. The haunting image of government workers in "moonsuits" mingling with plainly clothed townspeople was telecast throughout the nation.

The notoriety accorded to Times Beach was due primarily to the presence of dioxin. This chemical had become infamous as a result of the Agent Orange controversy involving the fate of Vietnam veterans who had been exposed to dioxin-contaminated pesticide. In

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the course of the lengthy congressional and legal wrangling over Agent Orange, it had become commonplace to refer to dioxin as "the most deadly poison known to man." Now this chemical killer was found to pervade an entire town. The EPA, smarting from congressional criticism for its dilatory approach to Superfund cleanup, found itself under enormous pressure from local citizens and their congressional representatives to act quickly and decisively to remove the toxic threat.

Dioxin's reputation as a hazardous chemical is based upon the fact that very minute doses of it are able to kill some laboratory animals, such as guinea pigs. However, it takes doses which are thousands of times larger to kill hamsters. Dioxin is also known to cause cancer when administered to rats and mice in very large doses. But despite several instances of occupational exposure, and a leak at a plant in Seveso, Italy, which spread dioxin over much of the city, there is not a single recorded case of human death from dioxin. Although some studies purport to show increased rates of a form of cancer known as soft tissue sarcoma, these findings have been disputed and other studies performed at various dioxin exposure sites have not turned up any elevation in cancer risk. In short, dioxin's status as a killer of guinea pigs is clearly established but its risk to humans remains very much in doubt.

This ambiguity did not muffle the drumbeat of criticism which the EPA was receiving from the media, the governor, and the Missouri congressional delegation. In order to protect itself, the agency sought some sort of scientific high ground to provide a publicly acceptable rationale for action. It therefore chose to decide what to do about Times Beach on the basis of the recommendation contained in the only readily available scientific effort to assess the health risks of dioxin contaminated soil, a study of Missouri dioxin sites which the Center for Disease Control (CDC) had completed that summer.

Before it could consider the health impact of dioxin *per se*, the CDC had to determine what, in fact, it considered an acceptable risk to be. It chose to accept the extremely conservative definition of acceptable risk which had become a convention within the public health profession, at least as far as exposure to environmental hazards is concerned. It defined a safe level of dioxin as that which did not elevate the risk of serious harm by more than one in a million.

Since it could not afford to wait and see how people actually came into contact with dioxin (or even if they did), the CDC had to make assumptions about how such exposure would occur. Here again, it adopted very conservative postulates. Although its own

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sampling data indicated that only the areas under the roadways and unpaved shoulders of Times Beach were contaminated, it did not revise the assumption which the study had made that all parts of the town were equally contaminated and that the dioxin content of dust inhaled inside residences was as great as that inhaled outside. It further assumed that residents would make no effort to avoid contact with contamination. Access to and contact with the contaminated soil would not be restricted. Preventive clothing would not be worn. And, children would not be prevented from ingesting soil.

Based upon these assumptions, the CDC set the safe level of dioxin exposure at one part dioxin per billion units of air. This number is so low that it is only via the most advanced forms of monitoring equipment that it is even possible to detect trace elements at the parts per billion level. The technology required to reach this level is both unreliable and extremely costly, therefore the EPA determined that the cheapest way to comply with the CDC recommendation was to buy the town from the residents, at a cost of thirty-three million dollars and order them to relocate elsewhere.

The illusion of scientific certitude provided by the CDC study undoubtedly eased the political pressure on the agency, but it contained two deep flaws which prevented it from actually serving as a useful analytic tool for decision making. It provided no means for comparing the Times Beach risk to that posed at other sites. It is conceivable that thirty-three million dollars could have purchased a far greater diminution of risk if spent elsewhere. Nor did the assessment even offer any real assurance that compliance with it would actually diminish the health risks posed by Times Beach. It is very hard to lessen risks that are already quite small without simultaneously incurring new risks of a similar or greater magnitude. The effort to rid Times Beach of dioxin would involve many activities —earth moving, construction, loading and unloading of contaminated soils—any one of which might create a risk of accidental death greater than one in a million. Likewise, the relocation of two thousand people incurs risk—from traffic fatality, suicide, and so on.

The problem was not so much with the risk assessment itself as with the purpose to which it was put. The "one in a million" standard was originally employed with respect to the occupational risks faced by workers exposed to radiation. Scientists working on this problem argued that it was reasonable that such workers face a risk from such radiation that was only negligibly greater than that faced by the population at large. Exposure assumptions represent a very crude effort at prediction. By erring on the side of caution with regard to the sources

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of exposure they are aware of, scientists hope to compensate for the impact of sources which they have failed to anticipate.

As a matter of broad social policy, these conservative risk and exposure assumptions make sense. It is not fair to place the citizens of any one community, Times Beach included, at greater risk from a specific threat than the society at large. Nor is it prudent to pretend that we can accurately anticipate all the sources by which a community might be exposed to a dangerous chemical. The issue at Times Beach, however, was not so general. It required the adoption of a specific rule to govern a concrete resource allocation decision. Should thirty-three million dollars be spent to evacuate the citizens? The use of this form of risk assessment was clearly inappropriate for that purpose. Yet for bureaucrats who had been given insufficient legislative guidance as to what to do under such circumstances, the CDC study was a godsend.

Searching for standards

Congress would appear to have had only two choices for remedying the sort of difficulties observed at Times Beach. It could have either specified a budget constraint or a goal constraint in the Superfund statute. The first option entails establishing a fixed amount of money for cleanup and then comparing sites not in terms of how bad they are but in terms of which ones offer the greatest risk reduction per dollar of expenditure. Resources would flow to those offering the highest marginal return. The latter course involves establishing a uniform set of standards to be achieved by all cleanup efforts. If the initial budget set aside for cleanup is inadequate to the task, it would have to be expanded until those preordained objectives were met.

The former option promises an efficient means for establishing priorities and making spending decisions. But it is difficult to imagine how the comparative evaluations it requires could be conducted so as to avoid the same damaging difficulties encountered by the Times Beach risk assessment. True, no prior assumptions would need to be made about safe levels, but the uncertainty about the real health effects of various chemicals, not to mention their synergistic effects, would continue to perplex decision makers. If we don't know how dangerous a given situation is, how can we compare its danger level to another situation or determine whether a dollar of cleanup will buy a greater diminution of risk there than elsewhere? Conducting the arduous research necessary to produce the data required for such comparisons brings with it the great polit-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ical liability of delay. The Congress, not to mention local citizens groups, already believes that Superfund involves too much studying and not enough cleanup. If the agency delays cleanup for even longer periods of time to produce comparative risk benefit studies of dubious validity, its credibility would be damaged beyond redemption.

The new version of Superfund, passed in August, chooses the other path. It seeks to insure uniformity of result. It interprets "how clean is clean" to mean that sites should be restored to a condition which would place them in compliance with existing federal environmental standards as those have been enumerated in air and water pollution legislation, the Toxic Substances Control Act, and the Safe Drinking Act.

The imposition of uniform goals would appear to provide unambiguous guidance about what each site must achieve and therefore about what level of resources need be committed to it. However, insistence on attaining such goals undermines any effort at imposing budgetary discipline. Abandoned hazardous waste sites pose engineering problems which are so complicated that the effort to meet these standards, which were not designed with those problems in mind, will prove extremely costly. To reach the required level of purity will, in many instances, entail massive earth moving and the pumping out of entire aquifers. The expenses incurred will quickly deplete even the expanded versions of the fund proposed by Congress.

The standards with which Congress wants sites to comply are beset by the same sorts of scientific uncertainties and arbitrary choices of assumptions and exposure pathways which have bedeviled Superfund. Failure to comply with them does not necessarily constitute a clear health danger. If the uniform standards plan is adopted, it will become increasingly difficult, as the cost of meeting those standards mounts, to convince Congress to provide additional funds in excess of the huge increase already proposed. Therefore the standards will not be met in all cases and they will not serve to slow the "arms race" occurring between the representatives of different communities who vie with one another in a desperate effort to convince the EPA that their own time bomb ticks the loudest. Cleanup priorities will thus continue to be set in accordance with "squeeky wheel" principles.

An alternative to Superfund

Congress cannot construct a rational policy structure for Superfund because the program rests on a false foundation. The metaphor of "ticking time bombs" is as misleading as it is evocative. The crisis mentality to which this image gives rise demands heroic, and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

therefore impulsive, action. Abandoning it frees the mind to treat the problem in a more deliberate fashion. Uncontrolled waste sites are not nice places. They cause property damage and can pose a threat to health, though not one of epidemic proportions. As such, they are not unlike so many other unpleasant byproducts of life in an industrial society. Their claim upon the public still needs to be judged against claims of a similar status—crime control, mental health and substance abuse treatment, air and water pollution control, and a host of other modern problems.

Such an exercise demands a high level of political responsibility in order to keep inflated claims from receiving too much attention. Political vision is also needed to weave different strands of policy into a coherent whole. No specific structural reform can guarantee that either of these virtues will ever be present in sufficient quantities. The exaggeration of risks, the misapplication of scientific analysis, and the inability to establish priorities, which have characterized the Superfund program might well have occurred under a different set of administrative arrangements. Nonetheless, changes in the design of the policymaking apparatus would serve to encourage greater political responsibility and a fuller consideration of the need to integrate cleanup goals with other worthy public policy objectives.

The key element of this new design is the devolution of cleanup authority from the EPA to the states. The EPA would no longer preside over a "carcinogenicity race" between communities, serving as the ultimate arbiter of which sites receive priority attention and how much is spent on each. Each state would make those decisions for itself.

Since the entire nation has benefitted from the reduced cost of chemical products made possible by dumping, all taxpayers, regardless of where they live, should continue to bear some financial burden for cleanup. That could be accomplished by reducing Superfund to a federal revenue sharing program. The national government would allocate monies to the states on the basis of a formula which attempted to measure their relative need. Such a formula could be based upon the number of chemical plants or workers in each state. If those indices prove unfair because they do not take account of the extent to which the chemical industry has fled to the Sunbelt to escape the mess it made in older industrial states like New Jersey, historic measures of chemical industry activity could be added to the formula.

By creating a ceiling on the amount of funds available to a given state, the revenue sharing approach encourages the exercise of political responsibility by state chief executives. It would no longer behoove governors to act as supplicants, exaggerating the problems

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

they face in order to appear more deserving in the eyes of the EPA. Since they could no longer deflect the demands of local communities for more aid, they would have every reason to defuse health fears rather than stirring them up to put added pressure on the feds. Because they need to protect other aspects of the state budget, governors would have a strong incentive to keep cleanup spending within the bounds set by the ceiling.

A governor is also in a better position than a federal official to establish cleanup priorities. The real value of cleaning up a hazardous waste site depends upon how that action affects other aspects of community or regional life—recreation, industrial development, housing, and so on. The narrow mandates of federal bureaucrats preclude them from taking such a wide range of considerations into account when they render a cleanup verdict. By contrast, to make such integrative judgments and to do so wisely and well is the very essence of what citizens expect from their governor.

The solution federalism provides

Other types of pollution problems—air and surface water pollution in particular—require national regulation because state control is not technically feasible. Rivers and winds refuse to respect state borders. Since the pollution they carry spills over state lines, national action is necessary. Hazardous waste sites, on the other hand, do not move. Although their insidious effects are not totally confined to specific local jurisdictions, they do not present an overwhelming physical rationale for federal primacy.

Although the "spillover" rationale does not apply to cleanup, it does apply to research. Research on this problem benefits all those who are afflicted with it regardless of where they live. It would prove both difficult and counterproductive to try to prevent those states which did not invest in research from obtaining the information produced by those that did. National coordination is also required to prevent expensive duplication of efforts and to ensure the most effective deployment of the limited pool of properly trained researchers.

It has been argued that even if state cleanup control is technically possible, the national government must intervene to protect the right of all Americans, wherever they live, to a healthy environment. Why should the "accident" of residence determine one's relative safety from toxic waste, it is asked? Such a claim for uniform protection can only be applied selectively, however, otherwise all efforts to combat environmental risk—including police, fire, and building inspections—would have to be nationalized. Why should

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the "accident" of residence in Manhattan be allowed to subject one to greater risk of being mugged?

In practice, uniform protection has been reserved for those cases where fundamental rights are at stake. Passage of the Medicare and Medicaid statutes implies that equal access to medical care has come to constitute such a fundamental right. The doubts and uncertainties which bedevil the hazardous waste question make it a dubious candidate for such status. Since reasonable people may well disagree about how seriously to take the problem and what best to do about it, a presumption exists in favor of permitting diverse approaches reflecting the mixes of preferences and priorities to be found in the several states. If further research shows the doomsayers to be correct, the path remains open for national preemption. This capacity to continually recalibrate state and national policy responsibilities on the basis of shifts in the public's understanding of what is at stake ranks among federalism's greatest virtues.

Opposition to decentralization on the part of federal officials, congressmen, and environmentalists has an additional source, which a former state environmental official refers to as "the Mississippi Syndrome." Mississippi Syndrome sufferers recognize that some states have the capacity to administer technically complex programs, but they are obsessed by fears about the incompetence of the others. For every California there is a Mississippi. Therefore, an intrusive and restrictive federal presence is necessary to prevent the least competent states from misbehaving, even if this has the effect of stifling initiative and creativity among the best.

This affliction had led to an exaggeration of the difficulties which the states would face if they assumed the full cleanup burden and an overestimation of the relative superiority of federal cleanup expertise. Like their state counterparts, the EPA relies on private contractors to perform virtually all of the engineering work associated with site cleanup. Federal officials function solely in a review capacity. They hire contractors and monitor the work. If the EPA was no longer in the site cleanup business, those officials would be available for employment by states. Even in Mississippi, citizens do not like to contract cancer. If the health risk proves to be really serious, they will, in all likelihood, demand that their state government hire experts capable of overseeing cleanup. Undoubtedly, great variety will exist in the forms of programs adopted to cope with this problem. Some states will be more efficient and/or more ambitious than others. That is what federalism is all about. In the absence of a threat to fundamental constitutional rights, such variety reveals a strength of our system of government, not a defect in need of correction.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Supporting the arts— whose responsibility?

WINTHROP KNOWLTON

FOR MORE THAN a quarter of a century there has been waged in this country a fierce, if intermittent, debate on the question of whether the federal government should endorse and fund a program of direct public support of the arts: in other words, we have been asking ourselves, should we have an arts policy?

By now all the "lofty" and the "vulgar" and the "economic" arguments[1] about whether art is a "public good" have been heard, and it is clear that those who think it is, and that therefore we should have an explicit program of support, have won.

The impact of this victory can be seen in the ability of the National Endowment for the Arts (NEA), the most substantial instrument of such a policy, to withstand what one arts advocate has described as "the ordeal by politics" to which it has been subjected by the Reagan administration. Funding for the endowment and its state counterparts has held its own in constant dollars since the beginning of the 1980s—this despite the fact that *increases* in private giving to the

[1] The terms are Professor Ronald Dworkin's. The "lofty" argument claims we ought to subsidize art because we can't be a great society without it. The "vulgar" argument says we ought to help art because it benefits taxi drivers and waiters near Lincoln Center. The "economic" argument claims art is a marketable good that should pay its own way.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

arts during this decade now nearly equal the public funding in question. (In other words, such public funding could have been virtually eliminated and the arts would have been no worse off.)

Proceeding, then, on the assumption that public programs of support are here to stay, I wish to address the question of whether the arts policy we have is either the right or the best one. The distinguishing feature of our present policy is that it advocates *more* of a great many things: *production* of more art, particularly innovative works of art; more *participation*, that is, more people creating art; more *access* to art by more people; more *diversity*, with encouragement given especially to regional and ethnic categories of art; and more *conservation* of works of art, great ones and merely good ones if they are unique. This list of values, or goals, has been articulated by many proponents of an active arts policy in recent years. It also closely resembles the landmark 1978 *Statement of Purpose* of the NEA.

To explore whether this emphasis on more of virtually every aspect of art is appropriate, I will discuss, first, the role of art in society today; second, the question of whether and how we might best help individual artists and arts institutions; and, finally, what our own responsibilities as arts lovers or arts consumers (depending on one's terminological bent) might be if we are to enhance the role art plays in our lives. In so doing, I hope to distill a more precise sense of where individual and institutional, and public and private, responsibilities lie.

Art and society

Perhaps the first thing we ought to recognize is that art is never what it once was. In the Middle Ages and early Renaissance, works of art (I refer primarily to visual works) were almost always renditions of holy stories produced by artisans delivering stipulated goods for a fee. In the Enlightenment, and perhaps more vividly in the Romantic Era, society became more self-conscious about art, more anxious to define it, and to formulate unifying theories about it. The word *aesthetic* crops up for the first time in the mid-eighteenth century. Toward the end of that century and through most of the following one, art was pursued for truth and beauty. It was cherished for its content and for the feelings it evoked, and this combination of certitude and exaltation provided (at least in the minds of scholars) partial substitutes for the solace of church and the ardor of state.

With the advent of our own century and the collapse of traditional ideas about the structure of the universe and of ourselves, art

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

has become something different again and something more—but exactly what? It has not shed its didactic role but, like the twentieth-century world itself, has become newly configured and more complex. Sometimes it is abstract, disembodied, fragmented, jagged; at other times, as in the case of modernist architecture, it is pristine, cool, "pure."

Along with new forms (and, or course, materials) came changed attitudes. In its various twentieth-century manifestations and manifestoes, art is, by turns, transcendental and therepeutic; it is high endeavor, shock, and prank. It is, above all else, *new*, with its newness taking an almost infinite variety of forms.

As in previous artistic epochs this change has been engendered by vast social, political, technological, religious, and commercial transformations. These influence not only what art is but how it is delivered. Never before has art been on display in so many different kinds of places—in museums, concert halls, and bookstores; in executive suites, shopping malls, nightclubs[2]; on airwaves and cassettes; even on spacecraft.

New technologies make it possible, furthermore, to enjoy reproductions of the visual and plastic arts, and to watch and listen to theatrical performances, opera, ballet, and concerts in the home. There has been much argument about whether access to these various derivative forms should count as exposure to "true" art. Whatever the ultimate outcome of that (exceedingly heated) dispute, these new delivery and facsimile systems would appear, at the very least, to provide a stimulus to the curiosity of novice arts consumers as well as a supplementary form of enjoyment for those already exposed to the real thing.

It is also worth noting that these new technologies know no national borders. To list a dozen or so artists who have enriched our lives during the past hundred years—Ibsen, Joyce, Proust, Faulkner, Eliot, Bishop, Beckett, Balanchine, Graham, Stravinsky, Matisse, Picasso, Johns, Le Corbusier, Chaplin—is both to acknowledge the extent to which twentieth-century art is international and to make us ponder what exactly, in this context, a national policy is. In a world of traveling orchestras and satellite communications, we benefit as much from Austrian policy toward Vienna's music institutions as Austrians do from ours toward Lincoln Center. When we talk of diversity in terms of our own (presumably neglected) regional

[2] Henry Geldzahler, former curator of twentieth-century art at the Metropolitan Museum in New York, acted as arts consultant for the 1985 opening of the Palladium, a disco gallery in downtown New York.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and ethnic specialties, we sometimes forget that these must now find their way in competition with Persian miniatures, Japanese kimonos, and Nigerian masks. In this setting, support of disadvantaged local groups in the name of equality or participation may have parochial and protectionist aspects we have not yet adequately addressed.

Finally, while still considering art in the aggregate (so to speak) and in its newer aspects, let us not forget that "old art" has not gone away. Indeed it is very much on the move. It is newly mined for marginal exotica, newly restored, newly packaged, and it, too, is newly delivered by the technologies described above. In addition, we constantly redefine and reanimate it by the ways in which we respond to it, our responses influenced by changes in our values and modes of perception (these, in turn, being shaped by the times in which we live). There is, for all these reasons, a kind of generational struggle in progress in which old and new art vie for viewing and listening and reading space, but with the old (in my judgment) increasingly compelled to redesign itself in order to attract our attention.

Is it possible that our arts policymakers, like our generals, are busy fighting the last war? That we already have more art available to us, new *and* old, than we can realistically absorb? That its diversity, especially if we consider its international dimensions, is awesome? And that innovation reigns supreme, so much so that it occasionally acts as a surrogate for art, making it difficult to determine what art actually is?

If the answer to these questions is affirmative, and if, accordingly, policymakers' emphasis on encouragement of more production of art of particular kinds (new, innovative, and so on) is ecologically unsound, then are there elements of existing policies on behalf of specific segments of the arts community (for example, individual artists, arts institutions, arts consumers) that make more sense? Present policies, after all, presume that aspiring young artists should be helped, that arts institutions should be helped, and that more people should be given access to art and should participate in the making of it as well.

Assisting the individual artist

Let us consider the question by starting with the individual artist, for it is he, in conjunction with and in response to the above-described broad shaping social forces, who creates the works we deem precious.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The job of identifying the artist who is worthy of support has always been difficult and is made even more so today because of our very insistence on equating worth with works that are "new" or "innovative." More demanding even than finding an artist capable of producing an individual meritorious work is the task of identifying those with the capacity to create an *oeuvre*. Why would one want to do so? Because it is the artists whose work evolves over time who make the most distinctive and lasting contributions to art.

George Balanchine was once accosted by the mother of a young applicant for the School of the American Ballet who asked, "Will my daughter dance?" Balanchine paused to reflect; the question came again, and he responded, "*La danse, Madame, c'est une question morale.*"

While talent (itself an elusive concept) may be a necessary condition to successful artistic endeavor, it is not a sufficient one: Also required is character, one (and only one) aspect of which is an obsessive prolonged dedication to one's craft.

Describing Balanchine's attitude, Lincoln Kirstein has written: "Two epithets he particularly detested, though they were frequently invoked to qualify his 'genius,' were 'creative' and 'original.' The first, he thought, was the more false; only less offensive was 'original' or its twin 'authentic.' Any unique explosion of initiative was usually mutation, but, more often, dilution."

If there is wisdom here, and I believe there is, then the matter of selecting worthy individual candidates for public (or even private) subsidy at the *outset* of their putative careers is even more difficult than we might have supposed. Like management consultants or venture capitalists exhorting clients to be entrepreneurial, all the while overlooking more subtle and demanding virtues, our benefactors may have their essential standards essentially wrong.

Another case made against support for individual artists (one that leaves me uneasy) holds that the artist needs to work *against* something. Lack of friction (or even of suffering) inadvertently dulls creative impulse.[3]

What I am arguing is a good deal less complicated—namely,

[3] Art critic Mark Stevens, writing in *The New Republic* (March 10, 1986), puts the broader cultural paradox as follows:

> However wild, unsuccessful, radical, or misunderstood a young artist may be, he is now a cultural insider; universities, the press, museums, government, foundations, and—most important—discotheques treat him respectfully. Yet this same young artist typically regards himself as an outsider. Or wants to, for he is steeped in a modernist ethos that positions the artist heroically above and apart from a corrupt society. This inside/outside perspective is part of the slow melt of modernism into mainstream culture. What was edge is now center.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that the artist whom we may wish ultimately to support cannot be officially "found" in the early stages of his career because his virtues are indecipherable. It follows from this quite practical consideration that he must necessarily be thrown upon his own resources —courage and endurance and evolving skill—with assistance limited to those nearby: family, friends, and idiosyncratic patrons whose obsessions match his own. Later, after talent *and* character have begun to be demonstrated, there may be more reasonable opportunity for other forms of support—a foundation grant, say, or a prize—but this is essentially a strategy of *recognition* and not of *discovery*.

There is an immense difference between those two strategies. The arts policy we have now, whether we consider its efforts to support art in general or artists in particular, is rhetorically and emotionally driven by the urge to stimulate, and even to induce, discoveries. These are, obviously, *new*, and they add to the stock of what we already have. Recognition, on the other hand, involves the granting of rewards for efforts that have already been made. Recognizers discriminate from a stock of objects or activities already in existence. Recognizers are driven less by the need to be ahead of the times than by a desire to sort out the times. Implicit in recognition is the notion of conservation.

What I am suggesting is that a realistic appraisal both of the overall state of the arts *and* of our limited ability to discover individual artists leads to the conclusion that arts policy might usefully move in just this direction: toward conservation. I refer to conservation not in the sense of finding art and storing it in archives but in the more active, indeed creative, sense of selecting, preserving, and presenting works of art to a variety of audiences, with the caveat that these works be created by artists who are already, to some extent, established.

The role of conservation

Let us explore the possibilities of such a policy by turning to the world of arts institutions, for an arts policy that has *conservation* as its central theme necessarily calls for the support, perhaps almost exclusively, of museums, orchestras, theatrical companies, and other such organizations. They, after all, are our means for the selection, preservation, and presentation of art.

While a policy devoted largely to helping arts institutions may seem relatively simple compared with the wide array of efforts now in vogue, it may, in fact, involve many of the same pitfalls. It can

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

be just as tempting to discover "innovative" or "new" institutions —in the performing arts, say—as it is to discover emerging new individual artists. And indeed, existing arts policies, which provide a good deal of financial aid to institutions, do just that, supporting a wide range of "experimental" groups. And in supporting large, established institutions, like urban museums, policymakers may simply be delegating existing policies downstream, for some of these institutions have agendas as broad as the public agencies from which they derive help.

The approach I wish to explore will provide more focus than do existing efforts; and it will be, I hope, more strategic, taking more explicit account of the role of other (private sector) players and acknowledging that we are dealing with dynamic forces—life cycles, if you will—that gradually force changes in priorities (indeed the priority of conservation will itself ultimately change) and in targets worthy of support.

There is, first and foremost, the life cycle of the artist, who must struggle alone most of the time but especially so at the outset of his career. As that career unfolds, the web of support, individual and institutional, from galleries or publishers, from foundations and museums, gradually widens and takes a greater variety of forms.

Arts institutions have cycles too. Let us return to the case of George Balanchine and the New York City Ballet to illustrate the point. When Balanchine came to America in 1933 there was no ballet in this country—not only no resident company but no audience to speak of and no discernible interest. He established, first, a school for dancers and then a small company, which for years was generously supported by Lincoln Kirstein and James Warburg, two idiosyncratic patrons who recognized Balanchine's genius and shared his passion for dance. There were other, lesser known individual supporters too. As time passed and word spread, an audience grew and the sources of support expanded to include the Rockefeller and Ford Foundations, corporations, more individual donors (large and small), local government (which helped house the company at the City Center and then the State Theatre), and then the NEA and the New York State Council on the Arts.

From the mid-1930s until his illness in the late 1970s, Balanchine had an unusual ability to turn hardship into triumph. A budgetary imperative like lack of scenery became part of the Balanchine aesthetic (an example of the constructive effect of restraints on art). He also ran a tight ship. By insisting there be no "star system," he helped put a cap on operating costs. In later years, after musicians and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

dancers had been unionized, he was able to limit their demands by threatening, persuasively, to close up shop and move to Switzerland. Box office prices were kept low, which helped attract an audience and more particularly to *hold* it. Attending performances several nights a week for years on end, a remarkable number of the members of this audience came to understand, not merely appreciate, the works they saw.

Strengthening the establishment

Today the New York City Ballet is part of the arts establishment. But with Balanchine gone, the enterprise has moved into another stage of its artistic and financial life cycle. Costs are rising rapidly. Despite increased financial assistance across the entire range of public and private benefactors, deficits are larger than ever. There is virtually no endowment. The question of whether support is still merited, or merited in traditional forms, is far more problematic than before.

Meanwhile, dance has become an accepted part of the American arts scene. Like the successful assimilation of art itself into the cultural mainstream, this was made possible not only by the brilliance of individuals like Balanchine, Merce Cunningham, and Martha Graham but also by the impact of other forces: our greatly improved ability to film or tape dance and to broadcast it (the technological contribution); the extraordinary success of a movie, *The Turning Point*, that made ballet glamorous (the commercial contribution); and the spectacular defections of Rudolph Nureyev, Mikhail Baryshnikov, and Natalia Makarova from the Soviet Union (the political contribution).

If these cycles exist (and they obviously do), then can we devise a philanthropic strategy that takes them into account and in so doing avoids fighting wars already won or intervening before the artistic stamina of promising individuals or institutions can be convincingly demonstrated?

As the story of the New York City Ballet demonstrates, cultural institutions, like individual artists, attract support from different sources as their lives unfold. There is no museum or orchestra or arts institution of consequence (with the exception of the formally public ones in Washington, D.C.) that has not received its initial financial impetus from individual patrons whose passions match (or indeed define) its own and whose tolerance for start-up hysteria cannot be emulated by institutional decision makers in thrall to committee and compromise. With recognition and gradual accep-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tance of artistic merit there come for these institutions, as with commercial ventures, managerial and financial perils of different scale and sort. It is in these middle years that institutional philanthropy, both public and private, can probably play its most useful conserving role, enabling the enterprise to hold onto what it has already produced, to permit it to evolve, and to *preserve itself* as a going concern.

What exactly should that role be?

I cannot answer that question with precision for the reply will vary greatly from institution to institution. I can, however, suggest some lines of inquiry and some new emphases that may help make existing policies more effective over the long run.

There are, to begin with, some broad questions regarding support for various genres of art. Clearly some require institutional support more than others (the performing arts, for example, compared with the visual). In addition, it may be that certain genres of art are at a stage of their life cycle that requires particular kinds of institutional bolstering. Is modern music, for example, an instance where much work of merit has already been done but where adequate conserving methods have not yet come into being? Does modern music need the kind of institutional support that the Museum of Modern Art has given modern painting and sculpture? Do we need an Orchestra of Modern Music? (Our present arts policies, with their emphasis on innovation, are likely to encourage the composition of more new music without acknowledging that the new music we already have goes unheard.)

Continuing in this vein, does the modern tempo of absorption —that is, the relative speed with which we take things in—favor certain arts over others (the visual arts, say, over literature)? And does this require some adjustment? The National Endowment for the Humanities' and the Ford Foundation's support of *The Library of America*, a definitive version of our literary classics (a project that could not have been undertaken by any commercial publishing house), is an exemplary undertaking of this sort, as well as of the kind of conservation appropriate to the times.

We come next to questions that are institution-specific. Does a potential institutional recipient of public support have "character" analogous to that of the worthy individual artist? Arts institutions, after all, are made up of individuals. And it is individuals like Alfred Barr, Arturo Toscanini, and George Balanchine that give these organizations aesthetic vision *and* managerial drive. Should we ever provide public support to arts institutions that lack such kinds of demonstrated leadership?

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Do we want to help a given institution because it plays a specific conserving role (would we support the New York City Ballet henceforth if its sole mission were the preservation of the Balanchine *oeuvre*?) or because it helps keep a variety of aesthetic options open, of which conservation might be an important but not necessarily an exclusive component?

What standards of accountability should recipient organizations be held to, and how can these standards be implemented without demoralizing creative spirit? How do we judge when funds are being squandered, when costs are rising more than they should, and when it is time, either because we have succeeded or failed, for additional funds to be withheld and public support gradually withdrawn? (We are woefully inadequate, in all of our programs of public subsidy, in articulating and implementing *exit* policies.)

Finally, there are questions relating to collaborative efforts with private-sector donors. As the descriptions of life cycles suggest, corporations, foundations, and public agencies are all likely to—and I believe should—enter the life of an arts institution at the same stage of its development.

The American corporation and art

I take it as a given that there will continue to be an important role for the American corporation in this philanthropic process. Indeed, recent statistics indicate that corporations have become the largest single institutional donor, public or private, to the arts.[4] These gifts will undoubtedly continue to be made under the rubric of self-interest, with an understandable temptation to support art that is attention-getting (blockbuster museum shows are a conspicuous case in point), for visibility enhances corporate image, and enhanced image makes philanthropy worthwhile to shareholders, or so executives assume. But it must be visibility of the right sort. And so there will also be a temptation for corporations to play it safe. Neither the tendency to be flashy nor to be bland is calamitous. Of greater significance is the transient nature of corporate interest.

This is particularly important if the policy of conservation is to include contributions toward endowment. Such support is not only consistent with the notion of institutional preservation but is today acutely needed—perhaps more so than ever before. It appears that only two dozen or so American arts institutions have endowments

[4] This is true if one ignores the role of indirect public support through taxbreaks. These, in a sense, are a kind of matching grant for private gifts.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

capable of generating annual income equivalent to three months' operating expenses. The great majority of the rest have virtually no endowment at all. These figures may be testimony to the fact that arts benefactors of many kinds have become more beguiled by the pleasures of supporting arts transactions—events and exhibitions—than by the task of building institutional durability.

If this is so, then there may be opportunities for the public sector, through matching or contingent grants or other collaborative efforts, to encourage its private sector counterparts to shift a portion of their resources to endowment-type gifts. Certain companies may be in a better position to do this than others. For example, a major New York life insurance company recently assumed all of the capital and operating costs required to open and operate a branch of the Whitney Museum in its new headquarters building. Here, visibility and endowment would appear to walk hand in hand. In instances where these kinds of gifts are less appealing to corporate donors, perhaps the public sector can compensate by shifting its own resources (and encouraging foundations to shift theirs) to endowment-type forms of giving.[5]

There would also appear to be opportunities for the two sectors to work together more imaginatively on another form of endowment: the human one embodied in systems of governance. Active participation by experienced and effective private sector executives, working more closely than has traditionally been the case with public arts administrators or their surrogates, may well be the key ingredient that makes new systems of institutional accountability work.

None of this will be easy. Bits and pieces of it have been tried. The programs of the new National Arts Stabilization Fund, building on the work of the Ford Foundation over several decades, is a pioneering attempt to knit public funds into a coordinated effort that includes elements of accountability. But it is still a small program and very much alone.

No single gift to the arts is perfect. Each is bound by silken (or steel) threads to a donor's ego or aesthetic sensibility or hunger for public acclaim. But if there is an intensified focus on conservation and if collaborative efforts are applied at the right time in the cycle—when needs are still great but quality and character persuasively established—then we may enhance our chances of weaving these various strands into a supportive web that is coherent and strong.

[5] While the NEA's challenge grant program helps further these aims, these grants account for only 12 percent of its total appropriations. The overall impression left by the NEA's 1985 annual report is of an extraordinarily diffuse grant-making effort that stands in dramatic contrast to the notion of functional and life-cycle focus endorsed here.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

I have suggested that existing public policies in the arts have an anachronistic and sentimental quality that manifests itself in an agenda that is both unnecessarily and unrealistically broad. I have explained why the emphasis on more—especially more production of the *new*—is no longer appropriate, if indeed it ever was, and why recognition rather than discovery may provide a more useful philanthropic frame. The policy to be put in the frame would then be one, essentially, of conservation, institutional in character and with strong elements of accountability. In describing the life cycles of individual artists, of genres of art, and of arts institutions, I have suggested where various public and private responsibilities might lie and a few ways in which the two sectors might work together to meet those responsibilities more effectively.

Personal responsibilities

However, as one observes the fantastic abundance and variety of art in our society, one cannot help but wonder if I have not left out a few important matters. What I refer to are policies that are not "arts" policies at all. The list of artists provided earlier in this chapter is testimony to the importance of freedom of expression in making art possible and of freedom of movement in making it broadly available to us from a diversity of places. These are, in a sense, the macro policies that go with the micro options I have been discussing. So too are educational policies that teach children how to read and write and to understand that the past has value. These seem to me more significant than specialized kinds of arts education designed to help students participate in the arts. (The two, of course, are not mutually exclusive.) Important, too, are macroeconomic policies that produce the levels of private disposable income that are the wellsprings of philanthropy and the building blocks of audiences that can partly, if not entirely, pay their own way. The responsibilities implicit in these various public philosophies and programs are central to our artistic endeavors.

And what of *our* responsibilities—those of us who are, as economists tell us, the ultimate beneficiaries of whatever subsidies are proffered? If conservation is to be a vital force, then the works of art preserved by the institutions we help must be conserved in our behalf. Public and private philanthropies help *us*, influencing the kinds and quality of art available to us, as well as its price.

We would appear to be giving art a great deal in return. After all, we worship it. Exactly why is not always clear: perhaps because art is wonderful or is it so well marketed or we lack other forms of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

solace and status. We may even worship art too much, expecting that it be all the things it has ever been over the centuries: visualizer of holy stories, exemplar of civic and moral virtue, therapist, entertainer, explorer. And our idolatry may be more ritualistic than we admit. We may utter the right prayers, but often we apprehend the objects of our adoration mechanically and on the run. Perhaps what is required of us is not reverence but affection and skepticism and most especially an abiding interest and concern.

Critic Robert Garis, one of the ardent followers of the New York City Ballet to whom I earlier referred, has written movingly of attending performances of *Liebeslieder Waltzes* over the decades, each time seeing and hearing it differently. He tells us that dancers, musicians, and members of the audience must all continue "to define works of art . . . to keep our minds open to new performers or critics who modify our ideas about the identity of a work of art, or show us that we were in fact wrong before, and that the new experience we've been given is finally, at last, the *piece* (emphasis added)."

Surely we must take the time to sort, to savor, and to reexplore works of art, redefining them and renewing ourselves. When all is said and done, is not the quality of these individual experiences at the core of what we are trying to preserve? If, as a result of these experiences, we become conservers too, and if institutions are needed to deliver art to us and to help us engage in this process, then it may be more appropriate than our economist friends would have us think to subsidize these institutions and, in so doing, to subsidize ourselves.

Are *we*, then, the ultimate conserving instrumentality? Are we, through the application of our individual tastes and judgments, the ones who determine which works of art will last or even what art itself will be? An affirmative answer makes for a pleasing ending, one in which we conclude, after examining various public and private responsibilities, by congratulating ourselves on our own importance. But sadly, I do not believe it is so. We can and should play a part here, as I have already said. It can be active and explicit; or it can be by default, leaving discriminations to others, in which case art will be more academic than it might otherwise be, or more commercial.

In much the same way as we refine our own aesthetic sensibilities, we should fashion arts policies that are helpful and attuned to our times. Of course, neither arts policies nor individual sensibilities are as significant as the freedoms we bestow on individuals to do their work; or the creations of gifted artists evolving their craft through difficult, prolonged, and even tormenting effort; or personal philanthropy, zany and sublime; or the broad shaping forces

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of society such as scientific discoveries, political revolution, religious revival, and economic upheaval. If, for instance, we were today in a period of artistic slackness—if the above described cultural ferment were in fact a "cover," as some allege, for lack of genuine creativity—then we might ask ourselves: How could we "pump up" the arts? The answer is, we probably couldn't, no matter how enlightened our policies or discriminating and heartfelt our aesthetic judgments. We would have to wait. To be patient. To let inexplicable events happen. Some things that are important are also mysterious. Some are important *because* they are mysterious. That is one of the essences of art. Recognition of our limitations in influencing the creation of essential "pieces" of art will not come easily to activist policymakers genuinely concerned with the public good. But this may be one of our abiding responsibilities, too.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Sex and the Conservative Body

MARK LILLA

ANY BOOK with the title *Sexual Desire*, and with the closing sentence, "*Vive la bourgeoisie!*," is bound to attract attention—less, perhaps, for the title alone than for the political conservatism that the last sentence implies. If Roger Scruton only intended to attract attention he hardly could have chosen a combination of subjects more likely to guarantee it. Conservatism may be the sexiest intellectual topic of the day, and sex the most politicized.

But *Sexual Desire*[1] has a more serious claim to our attention. Until now, we have not had a detailed examination of sexual morality like this one, written from a principled, secular conservative viewpoint. Traditionally, political conservatism has had little to say about personal sexual morality, and nothing to say about sexual psychology: Sex was farmed out to religion, and what religion said, went. This division of labor could be supported out of sincere religious belief or out of a secular concern for moral education and social cohesion, but in either case conservatives have been disinclined to develop a sexual psychology of their own. On the contrary, they find such a project ludicrous, and potentially dangerous: If religion cannot speak to the sex question, politics certainly cannot. As they see it, a political doctrine can only hope to define the bounds of public morality and leave psychological well-being to the ministers and therapists.

Roger Scruton believes that this separation of the psychological from the political has confused us about the nature of sexual experience and sexual morality, and that a philosophical reconciliation is in order. This is a very serious project—but one cannot be sure how many readers will quite understand that. Given the difficulty of the book and the novelty of the enterprise, there is terrific temptation to skip the difficult sections and read this book from the index back. What, such readers will wonder, does Scruton deem to be conservative "safe sex"? They will encounter only a few surprises. Marriage, fidelity, and gender differences are predictably in; bestiality, paedophilia, incest, and pornography are out. Sadomasochism, mastur-

[1] Roger Scruton. *Sexual Desire: A Moral Philosophy of the Erotic*. Free Press. 428 pp. $25.00.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

bation, and homosexuality move from the lighter areas of the moral spectrum to the darker. For the index reader with settled views on conservatism, and who treats this book as a moral manual (or manifesto), the only real surprises will be in discovering what is missing: a criticism of contraception, for example, or pleas for premarital chastity. Otherwise, the doctrine is familiar.

But in philosophy, as in sex, how one gets to the end is more interesting than simply reaching it. This certainly is the case with *Sexual Desire*, the conclusions of which are often its least interesting and most debatable features. What makes the book both a significant work of recent moral philosophy, and a permanent contribution to conservative thought, is that Scruton has managed to reach his conclusions by painstakingly describing and defending the social-psychological roots of our common sense about sexual matters. Despite the book's analytic appendices and occasional academic formalizations, one is tempted to say that it is less a work of philosophy (as currently conducted) than of moral psychology—psychology of the sort most professional psychologists seem incapable of writing today.

The book's *real* politics are thus to be found, not in the Hegelian chapter on "sexual politics," but in this carefully outlined moral psychology that undergirds the conservative moral doctrine. Had Scruton wished to take a traditional conservative approach to his subject, he simply could have criticized liberal sexual morality for placing individual pleasure over the social good. Instead he has chosen to meet his adversaries on their own psychological turf, and it is there that his achievement must be assessed.

THE ADVERSARIES are a mixed lot, but they do share one presupposition about sexual psychology that Scruton, for lack of a better term, labels "platonism." Beginning with Plato's *Symposium*, he finds the view that human beings are divided between the sexual desire of the body and the erotic—but asexual and disembodied—love of the soul. This dualism has not only haunted all efforts to "spiritualize" desire in the Christian tradition and in Kantian morality, but has also hastened the derationalization of desire in Freudian sexual science and, Scruton seems to believe, our post-Freudian self-indulgence. Now, there are, and always have been, different ways of overcoming this dualism. One might reflect on those existing moral codes (in Judaism, for example) that do not depend on a radical body-spirit dualism, or celebrate a literary exemplar of a morally unified personality, as Shirley Robin Letwin did in her recent book, *The Gentleman in Trollope*. Roger Scruton chooses instead to write a "phenomenology" of sexual desire.

When I hear the word "phenomenology" I usually reach for my pillow. But Scruton wears his Husserl lightly, and actually has something much simpler—and much more compelling—in mind. The mistake of sexual dualism, he writes, is to assume that the essence of desire is to be found below the surface of experience—in

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the depths of the beautiful soul, or the unconscious, or the nervous system. But we can also treat experience as it appears to us *on* the surface, leaving aside metaphysical questions of the soul and the recent fascination with biochemical "human sexual response." And, from the moral point of view, isn't this the way human relations should be treated—at the level of our intentions and beliefs about each other? It is the assumption of this book that, whatever the scientific outlook may reveal about some of our capacities, it threatens to estrange us from the surface of social life, the level at which we make our intentions known and decide to distinguish the valuable from the destructive.

Treating sexual experience in this manner will not satisfy the mind/body fetishists who are Professor Scruton's academic colleagues, nor will it satisfy those who believe that there simply is a variety of sexual responses and practices, about which one may not derive general knowledge. Our everyday experience and the best of our literature teach us otherwise, Scruton insists: that sexual desire exists within a social setting, that its character and boundaries can be discerned, and that, in the end, purity of desire is to want one thing.

The consequences of remaining at this "natural standpoint" on the surface of sexual experience are remarkably far-reaching, and are summarized in two fundamental insights. The first is that desire is intentional and interpersonal—that it seeks out a response from an individual object of desire, not impersonal physical release. The bulk of the book persuasively develops this point, restoring to our attention those features of desire that science has been unable to capture: the smile and the caress, shame and jealousy. Through quotation and summary, Scruton reveals why our poetry and novels treating those surface experiences are unfailingly more erotic than the sexologists' hydraulic manuals. His second insight—that desire is a public phenomenon, arising within the mores and institutions also constructed through human intention—is less well developed. But even here he is on the right track, insisting that the interpersonal nature of desire makes sexual morality a public matter.

DESIRE, and moral reasoning about it, begins with arousal. Here we are most slave to our bodies. Or so it seems, since the movement from passivity to interest appears to take place without our willing it so. But while the will may not dominate, consciousness of the other certainly is present. "Arousal," Scruton writes, "is a response to the thought of the other, as a self-conscious agent, who is alert to me, and who is able to have 'designs' on me." Your appearance and the thought of experiencing it are not enough to arouse me; what excites me is the thought of someone with your appearance being aroused by me, and eventually surrendering to that arousal. ("He didn't long to possess a girl's body," Milan Kundera writes of a character in *Life is Elsewhere*, "he longed to possess the face of girl who would yield her body to him as proof of her love.")

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Arousal depends on the expectation of reciprocity, each of us inviting our own bodies to overcome us. This reciprocity requires two individuals with intentions and thoughts: Even arousal by an anonymous stranger depends on the hope of his being aroused as well, despite the anonymity. This reciprocal, interpersonal account of arousal explains why the preliminaries of seduction are so important. The glance, the caress, and the kiss arouse by confirming that the other is surrendering to arousal, too, while an inappropriate glance or laugh can give doubts, "killing the mood." An embodied, aroused person—or the thought of one, as occurs in masturbation and prostitution—is required for arousal; a thinking, feeling being willing to extinguish his rational self-control is what we crave.

In arousal, the involuntary and the intentional mix and fuse into the next stage: desire for this mixed and fused being, an embodied personality. But what is it we want? Certainly not just orgasmic release, which can be accomplished by other means. Scruton believes we can best understand the goal of sexual experience much the way Kant understood our aesthetic experience: as the perception of "purposiveness without purpose." We see the desired person as the means to physical satisfaction, but also as the embodiment of that end: I want physical satisfaction with *you*. It is no poetic fancy to say that I seek to "unite" with you, and craving that union does not commit me to "loving your mind and not just your body." All it means is that I want to experience the union of your body and personality which you have created in surrender. Desire is more than animal hunger, then, but it is not yet love. Scruton believes desire usually "provides a motive to love," as we seek out reasons for our desire by "moralizing" the object of our affections. But his unconservative conclusion is that it can be morally acceptable without involving love.

This is the center of Scruton's theory, and the rest of his reflections and moral principles depend on it. For example, one interesting corollary of his relentless focus on "embodiment" is that gender cannot be ignored in our moral considerations. Just as we are mistaken to think that desire resides in the body and love in the mind, we are wrong to think that our personalities can be abstracted from our sex. The dualism of liberal morality, which strongly insists that I be treated as a person apart from my physical attributes, issues forth in what Scruton calls a "Kantian feminism" in sexual morality. This distorts the nature of our experience, since we desire, not merely another "person" whose body happens to provide physical release, but an embodied person whose gender is indistinguishable from *who* he is for us. Homosexual desire, in this view, is categorically different from heterosexual desire because it explicitly seeks out sameness of gender, and rejects difference. Scruton goes too far when he argues that homosexuality can thus be considered perverse insofar as it avoids commingling with a completely foreign personality. (Bisexuality would provide both experiences.) But he is right

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to insist that Catholic condemnation of nonprocreative homosexual acts cannot be reconciled with his theory of the moral nature of desire.

IF WE ARE to take moral philosophy seriously, we must be open to reasonable criticism of our intuitions and habits. But moral philosophy is only worth taking seriously if it first *begins* with the intuitions and habits we already share and attempts to make some sense of them. This virtue of description and explanation is what distinguishes *Sexual Desire* from other recent treatments of sexual ethics. By beginning with arousal and explaining how we come to desire another, Scruton is able to make sense of our instinctual revulsion against, for example, prostitution, pornography, and incest. His descriptive powers also make it possible to see why the psychological dualism of liberal morality inspires so many confusions about sex. When considering individual morality, this liberalism assumes desire to be a product of biological (or subconscious) urges for which we are not fully responsible; but when considering social morality, it assumes that we are rational, consenting adults whose sexual preferences are not open to social criticism or control. Neither position is true to our sexual nature, however, so we must begin by fundamentally reexamining the experience—as Scruton has.

That done, the sexual ethic Scruton defends flows fairly directly and predictably. Other conclusions might have been reached on similar grounds (especially, one suspects, regarding homosexuality), but Scruton's treatment of the perversions—as well as his explanation of how desire points toward love, marriage, and fidelity—is generally consistent with the view that any sexual practice is immoral that reduces either party to something less than an embodied personality. So, with few exceptions, he has arrived at predictably conservative strictures without making particularly conservative social or religious assumptions. That is a real achievement.

But there is another conservative undercurrent—one that shows up most clearly in his treatment of Freud and of sexual moral education—that is more disturbing, and makes us wonder whether, in the end, Scruton was able to free himself completely from the conservative's traditional distrust of sex. Scruton's antagonism toward Freud is not entirely ill-founded since it is based on the scientific criteria Freud himself applied rather rigorously to his own work. Within this range Scruton is quite good, doing more in a few pages to cast doubt upon Freud's sexual metapsychology than other recent volumes have (Adolf Grünbaum's, for example). He persuades us that Freud's mixing of scientific terms with literary metaphors fails, in the end, to account for the intentionality of our desire—how we come to desire *this*, and not *that*, person—and that Freud was too obsessed with genital release to make sense of the full geography of sexual arousal and satisfaction.

All this is fine, but something crucial is missing—namely, a sense

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of Freud's own moral project, and how it might compare with Scruton's. That Freud saw himself first and foremost as a scientist is undeniable. But Philip Rieff, Lionel Trilling, and even Ernest Jones have also helped us see that Freud's motivations—his *intentions*—were deeply moral as well. Freud wished to make us confront the tragedy of sexual neurosis and dysfunction for the first time, to make us see that there are men and women who, for whatever reason, become incapable of ordinary sexual fulfillment, and whose hidden problems fill them with self-loathing, drive them to perversion, or, in some cases, to self-destruction. If today, living with the unintended consequences of that revelation, we look less critically upon the social conventions that Freud and his more radical followers blamed for sexual neurosis, we ought not extinguish our pity or sympathy for those whose sexual life brings them pain rather than pleasure, or leave them out of our moral reflections.

Scruton's phenomonology of desire, beginning as it does with arousal and becoming ever more intentional, is not really equipped to recognize the difficulties these people face, or the moral puzzle they pose. Since he has rejected Freud's metapsychology and its explanation of infantile repression, he has little maneuvering room, leaving the impression that we bear moral blame for our sexual incapacities as well as our chosen perversions. One way out of this difficulty would have been to affirm that the prerational sexual development of children can scar them, and therefore relieve them of some responsibility. This admission would not have been inconsistent with intentional desire, since it only concedes that psychological problems might prevent arousal from arising, as it were, before our self-conscious intentions develop. At one point Scruton does concede that "the early experience of parental love seems to have a bearing on sexual development and upon the ultimate choice of sexual object . . . the intentionality of desire does not spring upon us unprepared, but is the outcome of a process and a history that determine its direction." But the moral consequences of this admission are never examined.

WHAT SCRUTON OFFERS instead is a short discussion of sexual moral education. The reader following him up to this point, accepting the psychology of embodiment and the account of sexual virtue, might expect to be offered the outlines of an Aristotelian moral education: one that recognized the twin vices of excess and insufficiency, and sought to shape our capacities for the mean. The chapter titled "Sexual Morality" in fact begins this way, as Scruton finds Aristotle's view of moral education of character and disposition to be in harmony with the nature of sexual experience, while the disembodied personality and universalizing reason of Kantian sexual ethics are not. He even invokes Aristotle's educative end of human happiness and flourishing (*eudaimonia*) as the ultimate aim of desire.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

There the similarities end. Reading Aristotle's *Ethics*, one never loses sight of the value of the virtues, and why particular relationships—friendship, for example—are to be encouraged for both the individual and society. In *Sexual Desire*, we never learn how, or if, sex is to be encouraged in this moral education. An entire chapter is devoted to erotic love, and concludes that "the erotic becomes fundamental to a full understanding of what it is for persons to be 'ends in themselves.'" But for all his splendid ability to evoke the experience of desire developing from arousal, Scruton never really celebrates it—the way Aristotle, for example, celebrates friendship. Instead of encouraging the *eudaimonia* of the bed, he only offers an education of control.

The word is not too strong. Almost all of Scruton's moral strictures involve channeling and controlling desire. A typical example:

> Thus, in the same way as the sacrifice of the brave man in battle may be shown to be supremely reasonable, so too might we justify such peculiar practices as chastity, modesty and sexual hesitation. . . . It may be in the long-term interests of the rational agent that he acquire just this kind of control over his sexual impulses.

Nothing is wrong with these sentences; moral education in any sphere will try to develop individuals' self-control, for their own long-term happiness, and for the public good. But any moral education worthy of the name will also seek to expand the capacity for action, and on this score Scruton has nothing to say. Even in the rare paragraph where he morally praises desire—writing that "the capacity for love in general, and for erotic love in particular, is a virtue"—the pedagogical lesson he draws is that virtue only demands self-control.

> To receive erotic love, however, a person must be able to give it . . . and, if this means bending our impulses in a certain direction, that will be the direction of sexual virtue. . . . the development of the sexual impulse towards love may be impeded: there are sexual habits that are vicious, precisely in neutralising the capacity for love. The first thing that can be said, therefore, is that we all have reason to avoid those habits and to educate our children not to possess them.

It never occurs to him that some individuals might need to develop and exercise certain latent sexual capacities if they are to experience that erotic love.

Scruton's moral education in desire is disturbingly consistent with his narrow treatment of Freud: In both cases he has unsympathetically ignored the problems of the erotically incompetent, for whom he ought to have some moral concern. Shame and modesty get their due; comfortable familiarity with one's own body does not. He even offers a startling defense of lifelong chastity, which, except for the most extraordinary person, he might have been expected to condemn as mildly perverse. By the end, one wonders whether below his moral education there lurks an ineradicable Freudianism that still fears being overwhelmed by wild, untamed desire.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ULTIMATELY, Scruton's sexual moral education derives less from his well-developed psychology of desire than from his wish to show that "traditional sexual education was, despite its exaggerations and imbecilities, truer to human nature than the libertarian culture which has succeeded it." He wants to refight the battles of the sexual revolution. And who can blame him? Today we see all too clearly that the aptly titled "revolution" has, in the course of reshaping Western public life, also produced new classes of conscientious objectors, prisoners of war, and now, most graphically, its dead and wounded. Any sexual morality based on a sense of embodied personality would have to condemn many aspects of the sexual libertarianism that obviously concern Scruton. But, to be consistent, it also would have to develop a moral education that cultivates as well as controls, celebrates as well as warns. It would, in short, have to overcome its own instinctive conservatism.

In the end, Scruton's psychological illiberalism is no match for his political conservatism. One even senses that, along with many religious conservatives today, he would morally approve of a sexual counter-revolution. But, like all counter-revolutions, this *coup d'état* would inevitably distort the record of the prerevolutionary situation. For despite the "exaggerations and imbecilities" of the present sexual climate, many people *did* need to be "liberated" and are much better off today—physically, psychologically, and, yes, morally. Do any secular conservatives really believe that our lives would improve if all premarital sex were still considered abominable, or if men and women were less sophisticated about birth control than they are now? However complicated and confusing—and often psychologically destructive—the new situation has become, many couples have finally learned to enjoy each other without the ignorance, overwhelming shame, and superstition about the body that haunted their parents (who also may have learned a thing or two). Even today, no Catholic needs to be reminded of the toll in self-loathing and moral agony that the *ancien régime* could exact. Certainly no Englishman should need to be told.

The most frustrating thing about Scruton's book is that it did not have to end this way. Though one might sympathize with and applaud his concern about public morality today, nothing in his psychology should make him so unsympathetic to psycho-sexual problems as he appears, and so obsessed with control in moral education. The problem is not with his psychology; the problem, I'm afraid, is his conservatism. Conservatives have never been comfortable with a candid celebration of sex because they have always seen in it a potential threat to public order, just as post-Freudian liberals have come to see public morality as a threat to individual psychological health. In the end, then, it is not surprising that even this intellectually honest effort by a conservative to understand sexual desire should founder on the question of moral education, where the demands of public and private life meet.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Had he been even more daring, and a little less political, Roger Scruton might have used his inquiry into sexual morality to challenge the tragic vision of Freud's *Civilization and Its Discontents*, showing us that moral education might still reconcile the demands of public order and psychological well-being. Such a demonstration would have completed and crowned this book's very real achievements—but also made it less predictably conservative. Perhaps, in the second edition, he can be persuaded to drop the analytical appendices and add a little "Guide for the Repressed." Or, at the very least, he might try to make his fellow conservatives face up to the moral truth they so stubbornly resist: that a body is a terrible thing to waste.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

FALL BOOKS

•

Abigail M. Thernstrom on racial progress
p. 96

James D. Koerner on foundations
p. 101

Andy Stark on individualism and communitarianism
p. 106

R. Shep Melnick on energy regulation
p. 112

•

Law and the Constitution

Jeremy Rabkin on Constitutional enmities
p. 118

Michael S. Teitelbaum on illegal aliens in America
p. 123

Michael S. Greve on judicial review
p. 127

•

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

How Much Racial Progress?

ABIGAIL M. THERNSTROM

Howard Schuman, Charlotte Steeh, and Lawrence Bobo: **Racial Attitudes in America: Trends and Interpretations.** *Harvard University Press. 260 pp. $22.50.*

IN *Civil Wars*, Rosellen Brown's stunning novel on southern race relations, a black friend says of Teddy Carll, a white liberal intellectually trapped in the 1960s: "He's in love with pessimism." Today people couldn't care less whether your friends are black, another chum remarks, "when they would have frozen you out—or burned you out, even better—fifteen years ago." But, for Teddy, time has stood still, and pessimism is an essential ingredient in his continuing commitment to the civil rights cause.

The question of progress, perhaps more than any other issue today, divides orthodox civil rights spokesmen from their critics. At the heart of most disputes on affirmative action and other racial issues are unstated assumptions as to just how racist American society remains. Conflicting claims are long on conviction, short on information. *Racial Attitudes in America* is therefore a welcome arrival. Systematically and thoughtfully analyzing data from several different studies on black and white attitudes from 1942 to 1983, the authors shed new and important light on a difficult, politically charged, issue.

SCHUMAN AND HIS COLLEAGUES look at questions asked by several nationally recognized organizations, and they organize the survey questions into four groups: principles, implementation, social distance, and miscellaneous. Those questions involving principles took the following form: "Do you think white students and black students should go to the same schools or to separate schools?" Or: "Do you think Negroes should have as good a chance as white people to get any kind of job, or do you think white people should have the first chance at any kind of job?" The implementation questions

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tested reactions to matters of concrete policy: "Should the government in Washington see to it that black people get fair treatment in jobs or leave these matters to the states and local communities?" Or: "In general, do you favor or oppose the busing of black and white school children from one school district to another?" Questions concerning "social distance" focused on how respondents would personally feel or act in particular situations involving racial integration. For example, would the respondent mind sending his children to a school where a few (or more) children were black? How about a situation in which a member of the family wanted to bring a black friend home for dinner? The final group, the miscellaneous questions, were just that: For instance, "In general, do you think Negroes are as intelligent as white people?"

On almost all questions of principle asked of whites, the authors find "strong positive trends over time." In fact, "if only this set of questions were available to chart white racial attitudes over the past four decades, it would be reasonable to conclude that there had been a remarkably large, wide-ranging, and generally consistent movement toward white acceptance of integration in most important areas of American life," they state. The survey results strongly support the view they label "the Progressive Trend"—the belief that we have witnessed consistent liberal change, culminating in a widespread commitment to toleration and racial equality.

QUESTIONS CONCERNING IMPLEMENTATION, however, reveal quite a different picture, as the authors see it. White Americans, they conclude, "are much less enthusiastic about modes of implementation than about abstract principles." Support for federal intervention to promote equal job opportunities, for instance, hardly rose at all in the decade from 1964 to 1974; it hovered near the 45 percent mark. By the later date, however, adherence to the principle of nondiscrimination in employment had reached almost 100 percent. Likewise, support for open-housing legislation was not strong (46 percent in 1983), although the trend was definitely up. Again, the contrast with enthusiasm for the principle of residential choice is marked. And while the vast majority of white respondents in both North and South backed school integration, opposition to busing was almost unanimous.

Unanimous opposition to busing, however, does not suggest uniform resistance to the presence of blacks in the local school, as answers to the social distance questions indicate. Ninety-five percent of white respondents in 1980 (in North and South) had no objection to sending their children to a school attended by "a few" blacks. Seventy-six percent, in fact, would accept a half-black setting. But the figure dropped to 42 percent when the question was living with a majority black student population. Responses to questions of neighborhood integration show a similar pattern: a sharp distinction made between the black family next door or on the same block

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and blacks "in great numbers" in the neighborhood. In 1978 more than half the sample said they would move if "great numbers" arrived. Yet the thought of a black next door triggered little objection by the 1970s.

Trend data for black attitudes is both much sparser and more problematic than that for whites. It is revealing, nevertheless. Not surprisingly, blacks are relatively less optimistic on the question of overall civil rights progress, and more likely to believe civil rights leaders are "going too slowly." Black approval of intermarriage is higher than white approval, yet still far from unanimous. More interesting, when asked whether they favored "desegregation, strict segregation, or something in between," an increasing number of blacks chose the latter response. But most striking are the answers to the implementation questions. Black support for implementing the principles of integration is stronger than that of whites, yet "always below—and sometimes well below—the near-100 percent levels blacks reach on several principle items." Moreover, both blacks and whites show declining enthusiasm for federal intervention to integrate schools, and the black decline is particularly sharp. By 1978 only 60 percent backed intervention. Likewise, with respect both to federal action to equalize job opportunities and to provide social and economic aid to minorities, black support steadily dropped.

What do the authors make of all this? On the question of black attitudes, they say simply, "we have identified more problems than we can solve." Looking at white responses, they resist the temptation (to which others have succumbed) to view responses on questions of principle as basically hypocritical. The fundamental shift in norms that the answers on matters of principle indicate is thus real. Yet the findings on attitudes towards implementation are also significant. They reveal the respondents' inner conflict on school integration and other issues, as well as a general "reluctance to accept constraints of any kind on behavior in cases where commitment to the goal of integration is relatively weak." They do not suggest that white Americans are "against integration," yet they constitute sobering evidence that progress has been limited. "What has occurred," the authors conclude, "is a mixture of progress and resistance, certainty and ambivalence, striking movement and mere surface change."

INFORMATIVE AND REFLECTIVE, *Racial Attitudes in America* will be immensely useful to anyone interested in contemporary social history, as well as race relations specifically. With its careful scholarship, it makes a valiant attempt to defuse the emotion that surrounds racial issues. The data on black attitudes is particularly important. Civil rights organizations have been thriving on a widespread and largely unchallenged assumption that busing and other current policies are clearly beneficial to blacks, that blacks therefore unanimously support them, and that whites of good conscience must as well.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The material on the views of whites, for quite different reasons, will surprise many readers. Schuman and his colleagues document a frequently denied fact: that America has undergone a breathtaking change in race relations in the last two decades. An era has passed, a new one begun—in the North, as well as the South. Racism still lives, as the 1984 campaign, for instance, of North Carolina Senator Jesse Helms made clear. But twenty years ago it was unimaginable that a black (Bill Cosby) would be chosen by a major investment firm (E.F. Hutton) to peddle the promise of financial security and well-being. Or that a black man and a white woman (the relationship that was traditionally particularly taboo) would co-anchor the nationally broadcast "Today" show. *Racial Attitudes* provides an important service in both confirming what our eyes can tell us, and in stressing the significance of the perception.

Nevertheless, aspects of the argument are troubling. The implementation questions that the authors group together in fact probe for responses to very different issues. They write: "Questions about implementation deal with approval or disapproval of steps the government might take to combat discrimination or to reduce racial inequalities in income or status." But combatting discrimination and reducing inequalities are different goals involving often radically different policies. One would naturally expect greater support for the former than for the latter. Moreover, even among those policies that "combat discrimination," some are more closely related to the underlying principle than others. Busing allegedly attacks discrimination in education, for example, yet its aim cannot be described in the traditional antidiscrimination terms of opening the doors of opportunity. And "open doors" is the principle to which 90 percent of white respondents committed themselves in 1982. The logical implementation question testing commitment to that principle would have focused, not on busing, but on freedom-of-choice plans (plans that allow parents to choose their children's school). The point can be put another way. The implementation questions are not abstract. They involve—explicitly—policies in the specific form they have taken in recent decades. And those policies are controversial precisely because they are often several important steps removed from the underlying principle.

STARTING FROM THE PREMISE that their implementation questions all test adherence to principle, Schuman and his colleagues are thrown off track at a number of crucial points. For instance, they argue that white resistance to blacks becoming a majority in their neighborhood or local school is a sign that "the change over the past four decades . . . has not been clearly toward full integration of blacks into white society." Integration in principle has not been followed by acceptance of integration in fact. But opposing restrictive covenants is very different from choosing to remain in a neighborhood that had become largely black. In the latter case the question

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

has probably become, in the respondent's view: Would I stay if my neighborhood became quite a different community? Whites cannot be faulted for recognizing a sociological probability: that they would find themselves outsiders, particularly since neighborhoods that "tip" often shift in class.

Similarly, the authors contend that unwillingness to endorse federal interference and coercion to solve problems cannot explain white resistance to busing, since whites do support federal enforcement of hotel and restaurant desegregation. Yet federal intervention has different meanings in the school and public accommodation contexts. Laws that force restaurant owners to serve blacks only affect whites to the extent that they will not be guaranteed an all-white setting when they choose to eat out. Busing is obviously coercive in a very different sense. And it is not a policy that builds on notions on which there is wide consensus. Schuman, Steeh, and Bobo call support for the idea of school integration, yet opposition to busing (and other such gaps between principle and implementation) "paradoxical." While the book does identify some paradoxes (some of the implementation questions do probe for commitment to the principle of equal opportunity), on most issues there is nothing mysterious about the white resistance the authors discover.

Failing to distinguish between types of federal intervention, they interpret their data on implementation as indicating limited progress—a rejection of full-scale integration. Whites who do not want the federal government to "see to it that black people get fair treatment in jobs" are not hypocrites (having professed that blacks should have "as good a chance as white people to get any kind of job"). Yet they do not give affirmative action (for that is the implicit policy question) the priority that the true adherent of racial progress would. Schuman and his colleagues explicitly reject the charge that whites are simply paying lip-service to principles; it is an oversimplification, they contend, to read the implementation answers as suggesting a lack of real commitment to integration. Yet *partial* lip-service seems to be their point; the simplification they disclaim is only a *bit* excessive: "Both commitment to a principle and commitment to its implementation must be seen as continuous dimensions." It is a pivotal statement. The line from *Brown* v. *Board* to busing is straight, they assume; the promise of the former is truly fulfilled only when the latter is fully accepted.

SCHUMAN AND HIS COLLEAGUES seem surprisingly surprised by a number of findings on both white and black attitudes. But they do little with their data on blacks. Are the views of black respondents equally symptomatic of inadequate enthusiasm for "large-scale" transformation—a "tendency to resist more profound racial change"? And if not, why is the description appropriate when applied to whites? It has been apparent for some time now that blacks are divided on the issue of busing and that black voters, given a choice

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

between a black and white candidate, will usually but not always choose a black. By extension, disagreement on related issues would seem expected. Bewildered by the data on lukewarm black support for implementation measures, the authors are left asserting with confidence the view "that it is important to bear black racial attitudes in mind when attempting to interpret white trends." The point could have been put more explicitly: Black attitudes on implementation suggest that white reservations are not solely or even primarily the consequence of racism. The authors do not make the implementation items the "touchstone of genuine commitment to integration." They argue against what they call the "Underlying Racism" school; in their view, prejudice has not simply become more sophisticated. Yet they lack the full courage to state that black constituents have a message that civil rights leaders and others seem unwilling to hear. Schuman and his colleagues hesitate to say what they do not know for sure, but *Racial Attitudes*, in only alluding to points on which they clearly have views, is modest almost to a fault.

Abigail M. Thernstrom is author of a forthcoming book on minority voting rights written under contract with the Twentieth Century Fund.

Inside the Angels

JAMES D. KOERNER

***Waldemar A. Nielsen:* The Golden Donors.** *Truman Talley Books/E.P. Dutton. 468 pp. $25.00.*

WALDEMAR A. NIELSEN has devoted five years or more to the study of big American foundations and has given us the results in two books that come to about one thousand pages. In his first book, *The Big Foundations*, published in 1972 and supported by the Twentieth Century Fund, he cast a cold and angry eye on the thirty-three foundations that, at the time, had assets of at least $100 million. In this second book, supported by the MacArthur Foundation, he looks with more charity (so to speak) on the thirty-six foundations that now have assets of at least $250 million. He still finds many of these philanthropies sadly deficient in their staffs, their boards, their grants, and, most of all, in their vision of the good society. But on the whole he is more pleased with what he sees going on today in the big foundations than he was fifteen years ago. The "Nielsen ratings" seem to be going up.

Nielsen begins with chapters that set the historical and political backdrop against which the big foundations conduct their "institu-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tionalized philanthropy." He describes the effect on private foundations of the infusion of massive federal funds in the 1960s and 1970s into fields in which foundations had also been active or might have become active. Government preemption over the last twenty years has confronted foundations with an enduring puzzle: They have to find something else to do with their money, and that is not easy in an age of omnipresent government. Some foundations try to lead government into new fields, providing reconnaissance for the big financial offensive, or they monitor government itself in an effort to improve the manner in which the taxpayers' money is spent. Otherwise, foundations today must be content to find those gaps in government programs that need more money and provide it.

Whatever foundations do, the climate in which they do it, as Nielsen rightly says, is very different today from what is was before federal, state, and local governments launched large-scale programs of redistribution. Take any field that comes to mind in which foundations have traditionally been active, and chances are that private funds are now eclipsed by public funds. Alzheimer's disease, underdeveloped countries, homeless people, alcoholism, handicapped children, low-income housing, drug abuse, the teaching of reading, soil conservation, occupational safety, rehabilitation of criminals, youth employment, environmental protection, cancer—in virtually every field, the state's role is now dominant. Cancer used to command attention and money from private foundations, but none of the golden donors has a major program today in cancer research and treatment. Considering that a single federal agency, the National Cancer Institute, spends over $1 billion a year in this field, what role can private foundations sensibly play? The public might regard preemption by government, in an era of mighty problems and mighty government, as right and good; but it complicates life for the big foundations (and for the small ones even more). All of which may not be news, but it needs to be said in a book on big foundations. Preemption by government is a problem they live with every day.

Readers of *The Public Interest* would find little to quarrel with in Nielsen's assessment of "the neoconservatives," whom he regards as a major force shaping the new environment in which foundations operate. They would be pleased with his estimate of the considerable influence of neoconservatives on public policy over the last fifteen years. The golden donors may have smiled on them far less often than on their liberal counterparts, but in Nielsen's judgment the neoconservatives have had a substantial effect on the ways in which the big foundations think about their work. Being a man decidedly of the left, Nielsen is presumably no friend of neoconservatism, but he does give it a fair shake with only the occasional error.

NIELSEN'S INTRODUCTORY CHAPTERS on "the changing political context," and the reforms forced down the foundations' throats by the redoubtable Representative Wright Patman (such as those

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

requiring foundations to stop hoarding their income, or those aimed at weakening the ties between the donor's company and the foundation he created), are informative enough. But when he moves along to his main subject, which he calls "A Gallery of Portraits," the book begins to disappoint. Here he offers the reader a series of sketches of the big foundations done in primary colors (Nielsen is not given to nuance or subtlety). He begins most of his drawings with a miniature biography of the original donor, combining fact, hearsay, reminiscence, and yeasty speculation of his own. Anecdotes of uncertain origin abound, and quoted comments of anonymous individuals sprinkle the text.

Nielsen has his good guys, such as W. K. Kellogg or William Hewlett, and his bad guys, such as J. Howard Pew or Howard Keck, and his good-bad guys, such as Frank Ernest Gannett or Herman Brown. Many of his golden donors were hard-driving, self-made men whose rise from lowly beginnings imbued them with a reverence for freedom, self-discipline, and capitalism, together with an abiding distrust of government and centralized authority. With exceptions, Nielsen does not care much for these rags-to-riches tycoons. Nor does he shrink from impugning their motives. He considers many to have been self-serving tax-dodgers whose first concern was the preservation of their empires, not the welfare of their fellow man. He finds many others whose motives in establishing their foundations range from glorious to insipid. How faithfully these brief biographies capture the man—and it is a man in almost every case—no one can say on the basis of the evidence presented.

One hesitates to call a book shallow when the author and various research assistants have labored for three years on it, but it seems a fair judgment in this case. Nielsen's "gallery of portraits" is more like a Cook's tour with one-day stops at three dozen foreign capitals. You see a few sights and get some uncertain feel for the city, but your impressions of the people and the country may have little relation to reality. Even so, the reader does get a lot of inside information about the big foundations—superficial, perhaps, but also interesting. We learn about the conflicts between donors and their families and between trustees and the staff; we listen to some gossip about the internal politics of this or that foundation; and we learn something about the departure of presidents and the arrival of their successors. We are also told about the decline of some foundations and the ascent of others. We get the true story, I guess, of Frank Thomas's "stumbling advent" at the Ford Foundation, the comic opera at the MacArthur Foundation, the Symbionese Liberation Army's "grant" from the Hearst Foundation, and the colorful peculiarities of all foundations from Texas.

MORE IMPORTANT, one would suppose, than the motives or character of the original donors is what their foundations do with the money. It is precisely here—at the heart of the matter—that

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Nielsen's book is the least satisfying. One wishes Nielsen would tell us more about what this great wealth is spent on and what difference it makes. His focus is so relentlessly on who gives the money that he scarcely touches more fundamental questions about foundations. One wonders what really works today in big philanthropy, what is it the grantees, not the grantors, do with the money. What have been some of the great achievements and great failures of foundation programs? Why is it so hard to give away money well? How do foundations go about designing programs and where do they get their ideas? Why do so many boards of trustees seek individuals with academic rather than entrepreneurial backgrounds for their staff?

It would have required no great imagination for him to have asked, for example, how often and in what ways foundations do more harm than good. Are they really doing good when they become enamored of an outstanding school principal or superintendent, one who has demonstrated extraordinary ability on the local scene, by taking him away from it and putting him in charge of a big national program, where he will likely fail, being out of his element? Is it a contribution to society for a foundation to generate projects that grantees do not really want to do, and sometimes dislike doing (they want to do something else), because the foundation thinks they should be done? If Robert Maynard Hutchins was right in saying that American universities have demonstrated that they will do anything for money, are foundations serving the public weal when they aid and abet this weakness? Does it really help the country for foundations to insist, as they frequently do, that the projects they finance attain "national significance," or does this mindless requirement merely corrupt the language in which proposals are written? The first commandment for foundations is, as the saying goes, to do no harm. How well the big foundations observe this commandment is only one of the more interesting questions Nielsen might have explored, but did not.

INSTEAD, HE OFFERS US broad, sweeping descriptions of thirty-six foundations and their activities. Take, for illustration, Nielsen's treatment of the Hewlett Foundation, one of the golden donors he likes pretty well. He reviews this foundation, which had assets of $575 million when he examined it, in seven pages, half of which are given over to background information about the founder and the staff. He then gives us three pages recording the foundation's fields of interest, such as "strengthening of institutions," "helping to create an effective democratic society," "improving the decision-making processes of the country," and contributing to "conflict resolution." These would seem to be promising and important activities and problems, and we would like to know what the foundation has actually done in these fields and with what results. But Nielsen only

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

gives us an "evaluation"—one paragraph that contains not a word about what was accomplished by any Hewlett grantee.

Nielsen's heart is with those foundations, such as Ford, Edna McConnell Clark, and Robert Wood Johnson, that make grants mostly to have-not groups and causes, that are egalitarian and reformist, and not afraid of public controversy—in short, groups that want to change society and its institutions rather than sustain them. He respects some others among his golden donors, such as the Mellon Foundation, which he labels "conservative" (he means elitist), but they do not engage his deepest sympathy. But whatever Nielsen's affinities, his gallery of portraits rarely gets at the underlying character of the big foundations.

Nielsen's problem was no doubt inherent in his task. Getting under the skin of thirty-six complex organizations of different ages, traditions, interests, and procedures might be job enough for anyone without his trying to probe, even by sampling, the work of thousands of grantees and relate that work to the state of the country and the world. Given the intimidating scope of his job, Nielsen understandably chose to settle for what he and his research assistants could glean from the publications copiously turned out by foundations and from interviews with a few of those who run or govern the foundations. (I'm guessing at Nielsen's method of work because he does not tell us anywhere what it was. We do not know who was interviewed, what documents were consulted, or much else about how he put the book together.)

WHAT NIELSEN OFFERS, then, is a descriptive as well as a judgmental handbook on the big foundations, and this has its uses. His book provides a great deal of interesting information that should satisfy the curiosity of readers wanting to know something about the internal affairs of these peculiar American institutions. For readers who share the author's personal vision, this is a book to make them happy.

What we need now, to accompany Nielsen's tour guide, is a deeper analysis of how the big foundations really work and what they accomplish with their grants. It should be done by someone less naive and harder to mislead than Nielsen.

James D. Koerner recently retired as vice-president of the Alfred P. Sloan Foundation and now runs a consulting firm for foundations.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Liberalism on the Couch

ANDY STARK

Morton Deutsch: **Distributive Justice: A Social-Psychological Perspective.** *Yale University Press. 316 pp. $30.00.*

James M. Glass: **Delusion: Internal Dimensions of Political Life.** *University of Chicago Press. 270 pp. $22.50.*

ANGLO-AMERICAN POLITICAL PHILOSOPHY is currently staging a debate between individualist liberalism and a new breed of communitarian critics. This debate implicates not only those who *do* political theory, that is, those who theorize about contemporary political problems, but also those who do research about the history of political thought. Recent attempts to locate a communitarian streak in the writings of the Founders and their interlocutors, or to discern a "civic republican" strand in the development of English liberal thought, are examples of this communitarian revival at the level of the history ideas. On the plane occupied by those who do political theory, the communitarians who are structuring the new critique of liberalism make two interconnected arguments, one metaphysical, the other political.

Metaphysically, contemporary communitarians insist, liberals are mistaken when they conceive of the individual as a free agent capable of choosing his own ends, goals, interests, and attachments. True, such a conception of individual identity makes the attempt of one individual to pass judgment on the private goals and beliefs of other individuals presumptuous, and of the state to constrain the actions following from those goals paternalistic. That is why it is politically palatable. But metaphysically, as Michael Sandel, one of the most prominent communitarians argues, such a conception of the individual makes him "inviolable only by making him invisible and calls into question the dignity and autonomy [that] liberalism seeks above all to secure." If an individual's entire personality is something he chooses, who is the "he" who is doing the choosing? What criteria does he have available? Liberals fail to recognize, Sandel writes, that "community describes not just what [individuals] *have* as fellow citizens but also what they *are*, not a relationship they choose, but an attachment they discover." Consequently, politically, communitarians feel less or even no discomfiture with, say, laws governing verbal expression or domestic life. For them, it is neither presumptuous nor paternalistic for the community to pass judgment on many individual ends and choices because it is the community which has constituted them in the first place.

FOR OVER A CENTURY, liberals have had a response to communitarian politics: It is the politics of intolerance. Liberal political theorists have not, though, until now, been confronted with a thor-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

oughgoing communitarian metaphysics, and are only just responding —in their graduate seminars and in the academic journals. In what appears to be the second round of the debate, the strategy of liberals, led by John Rawls, author of the celebrated *Theory of Justice*, is simply to question what they see as a Manichean division assumed by communitarians. The community, these liberals assert, is in some respects constitutive of individual personalities, while in others, individuals remain independent of the ends they choose. The communitarians, on the other hand, ruthlessly deny that such a hybrid is possible. Michael Sandel has accused Rawls of "incompatible commitments" when he attempts to combine "intersubjective and individualistic" images into one theory.

Communitarianism thus couples its—by liberal standards—intrusive politics with a psychological continence. But while traditional liberalism has always been politically diffident, its psychological aggressiveness is only now being debated. Two recent books, Morton Deutsch's *Distributive Justice: A Social-Psychological Perspective*, and James M. Glass's *Delusion: Internal Dimensions of Political Life*, represent the poles in this particular argument. Both Deutsch and Glass are political theorists operating within a psychological tradition: social psychology in the case of Deutsch, psychoanalysis in the case of Glass. Yet while Deutsch's book is filled with experimental results suggesting psychological affinities between liberalism and certain communitarian values, Glass's book denies that liberalism can provide any psychological satisfaction of the human yearning for community.

THE BULK OF *DISTRIBUTIVE JUSTICE* is the compilation of experimental results and analysis that Deutsch and his students at Columbia have conducted over the past several years. These experiments trace the psychological affinities between liberal notions of distributive justice and rights on the one hand, and beliefs about community, solidarity, and cooperation on the other. Most of the experiments report strong connections between "liberal" and "communitarian" values, and suggest the possibility of hybrids.

One chapter, for example, reports experiments showing that a strong sense of solidarity and community feeling may lead an individual to believe not in an egalitarian but rather in a liberal-capitalist scheme of justice. Deutsch and his colleagues assembled forty pairs of individuals, and divided the pairs into two groups. In the first group, each member of each pair was induced to regard the other as a friend with whom he was to cooperate on a task (a word game); the point of that task was to bring them closer together. In the second group, each member of each pair was induced to regard the other as a colleague, with whom he was to work jointly but not in concert on a task; the point of this task was to sharpen individual efficiency. When the tasks were completed, one member of each pair was given a greater reward than the other, regardless of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

actual work done by each. In other words, each pair was split into a "have" and a "have-not." Surveys were then administered to determine psychological connections between a given subject's position in his two-person hierarchy, his feelings toward the other (friend or competitor), and his views on the principle of distributive justice appropriate to his little society.

Of the many intriguing results, one stands out: In the "cooperative" pairs, the "haves" tended to favor more egalitarian principles of distribution (perhaps no surprise), but the "have-nots" tended to favor more capitalist principles of distribution. Deutsch's conclusion is that community and social solidarity foster, first and foremost, not egalitarianism but trust, and trust means, in the case of "have-nots," trusting the fairness of a system of distribution in which earning, not need, is the favored criterion. The intriguing upshot is that a "cooperative" social environment can encourage acceptance of capitalist distribution on the part of those who benefit less from it. In other words, solidarity is the opium of the masses.

This one example shows the utility of Deutsch's psychological analysis for current liberal political theory. Deutsch has shown that, psychologically, liberal justice and communitarianism can be connected. In so doing, he is denying through the use of experimental psychology what communitarians—Michael Sandel being the most prominent—are determined to show theoretically: namely, that liberal notions of justice are strictly incompatible with human needs and feelings for community, that a "self" can be conceived that sustains one or the other, but not both. Still other pieces in Deutsch's work probe the frontiers between liberalism and other communitarian values—fraternity, mutual identification, knowledge of the other, group membership, politeness—suggesting that, on the psychological level at least, rapprochement is possible.

IN *DELUSION*, James M. Glass takes a contrary tack. A political scientist at the University of Maryland, Glass spent over seven years studying psychoanalysis and interviewing schizophrenic patients at the Shephard and Enoch Pratt Hospital. Most of the book consists of case histories of schizophrenics, identified as Frank, Ellen, Jenny, and so forth. The final chapters merge Glass's psychoanalytic accounts with his political message—which is that the psychology, or "self," of the liberal citizen is essentially schizophrenic.

Glass firmly believes that his understanding of the liberal citizen cannot be reconciled with classical liberal psychology. The citizen as typically conceived in liberal theory, Glass argues, is nothing but a "Hobbesian monad": "The self, in this view, [is] like a sieve: experience runs right through it; what remains is an empty vessel. Nothing is stored up—no layers, no sediments, no human archaeology." In actual liberal states, though, the citizen suffers from schizophrenic delusion, and "although delusion breaks contact with socially generated, historical meanings, it remains an index of cer-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tain historical contradictions and struggles within the self's ontogenetic history." In order to make his radical departure from the Hobbesian conception of the citizen clear, Glass (rather predictably) identifies his anti-Hobbesian citizen as "Rousseauian." In particular, we are told, the schizophrenic is Rousseau's natural man placed in liberal society. Because the liberal political order, with its liberal understanding of the self, is so ill-suited to meeting man's real psychological needs (in particular, his needs for empathy and community), the liberal citizen retreats from reality, and conceives his world in the symbolic, metaphorical, and irrational terms of the schizophrenic.

THUS, LIBERAL POLITICAL THEORY, mistakenly positing a citizen with a self-less, history-less psychology, constructs a political order appropriate for him. But this order, when filled with actual empathetic, history-encumbered individuals, makes them schizophrenic. What, then, is the function of political theory? Glass first writes:

> Many of the concerns of schizophrenic epistemologies mirror themes in the history of political thought. . . . I argue that the stories, fables, and "theories" implicit in schizophrenic delusions reflect ideas that historically have been of concern to political theory. . . . The point is not that delusional symbology should be compared to theoretical imagination, but that political theorizing may be occasioned by many of the same issues and motivated by many of the same forces that unconsciously preoccupy schizophrenics.

From this, and from his discussions of Plato, Machiavelli, Hobbes, and Rousseau, we are given to understand that political thought is a *cri du coeur* of the theorist, like the ravings of the schizophrenic. Not only do the writings of political theorists mirror the "symbologies" of schizophrenics, but the entire history of political thought itself mirrors the development of the human psyche:

> Perhaps the delusional self's journey from Hobbesian terror to the Rousseauian recognition of empathy and pity mirrors psychological developments in the maturation of the human self: the violence and indeterminacy of a Hobbesian nature precedes the emergence of the complex affective states of empathy and relatedness. Certainly, Frank and Ellen's movements from nature to community suggests that it is empathy that restores the self's social and relational being.

But sometimes, Glass identifies the schizophrenic not with the political theorist, but with the therapist:

> The [political] theorist's purpose is to create a political ego; the psychotherapist's is to integrate an ego so fractured that the self has no normally recognizable identity. Theorist and therapist alike work to found self-sustaining and recognizable identities; both seek to break down identities built on non-consensual reality; both seek to establish a relationship within some form of community or civility.

No political theorist I know of would recognize himself in this description—but perhaps that is why Glass thinks it makes the point. He writes:

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> what is necessary for the schizophrenic (and the schizoid political community) is a therapy aimed at a massive reordering of internal psychological structures. This is definitely not the task of theorists in the tradition of modern liberalism, but it is the therapy intended by a philosopher who confronts a culture that is seen as psychotic or delusional.

Now, apparently, it is the task of the political theorist-cum-therapist to diagnose the liberal polity as schizoid, psychotic, and delusional —and to then prescribe treatment. Two pages earlier, the theorist was crawling into the cell next to Frank and Ellen. But no matter. The point rings clearly: Liberal societies and communitarian psychology, it seems, cannot be reconciled, so liberal political institutions will have to be destroyed. Rousseauian man will take no prisoners.

GLASS'S BOOK sets out in sharp relief what seems to be a current communitarian strategy of resistance to any attempt by liberalism to lay claim to some of its values. On the one hand, our political order is diagnosed in psychological or psychopathological terms—it is narcissistic, egotistical, possessive, paranoid, prurient, schizoid, psychotic, and delusional. On the other, our individual psychologies are described in the language of political theory—we are "thickly" or "thinly" constituted; "transcendental" or "encumbered"; we are "agents" who have "ends"; we are monadic or historical. However debatable this approach, it is a perfect strategy for a doctrine like communitarianism that wishes to be socially aggressive while remaining psychologically inviolate.

The use of psychological terms to describe the liberal polity allows the communitarians to be much more assertive in their attacks on that polity. If it is no longer individuals but an entire society that is "sick," then the license to prescribe social therapy is smuggled in through the etiquette of liberalism. Liberals who allow themselves to participate in this debate find themselves arguing that liberal society is "healthy," that narcissism is only self-confidence; egoism, self-sufficiency; possessiveness, human potential; and so on.

The use of political-philosophic terms to describe individual psychology enables the communitarian to draw categorical distinctions between certain types of psychologies. A self is either encumbered or it is not; he can have rights or community but not both. Liberals who permit themselves to get entangled in debate at this level find themselves, as John Rawls and Ronald Dworkin have done lately, in different ways trying to graft together divergent philosophical conceptions of the individual, creating hybrids who are thickly constituted yet reflective, encumbered yet free and equal. Consequently, many liberals have recently come to be seen by their critics as having made bonds into freedom and illness into health.

DEUTSCH'S BOOK, which I place in the liberal tradition, suggests an approach which liberals might find more suited to their own purposes. It can only be taken, though, if liberals refrain from

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

talking about political society in psychological terms, and individual psychology in political-philosophic terms. *Distributive Justice* is evidence that liberals, by talking about the self in distinctly psychological terms, can begin to explore, at the psychological level, the affinities between the needs for community and individuality. Because these affinities will be psychological, they will not be logical. That is, they will be incoherent on the standards of philosophical rigor that conceptions of the self are currently being tested against by the communitarians. Deutsch, it should be noted, does not feel uncomfortable, as many liberals do, with acknowledging that there is an urge to political community that a liberal society ignores to its peril. The most palatable way for some liberals to regard such an urge might be, in Gorky's words, as an "emotion [that] resembles basic physical necessities, with the disagreeable difference that political necessities are unavoidably accomplished in public." In treating the need for community as a psychological given, instead of ridiculing or denying it, Deutsch does liberalism a service. He shows that communitarian values can be compatible with liberal ones at the psychological level.

On the political level, Deutsch's work will likely suggest to liberals the fruitfulness of exploring new ways in which concepts of rights, justice, and citizenship can accommodate citizens more psychologically complex than the Hobbesian monad as described by Glass. In actual fact, the institutions of the liberal polity always make some such accommodations. While both the United States and the Soviet Union have nearly identical laws respecting the rights of individuals, the United States has additionally some which accord rights to individuals conceived as having attachments—for example, evidentiary laws that excuse spouses from the civic obligation of testifying against one another, and immigration laws that recognize the need to preserve family as a claim to citizenship. It is the *liberal* society, not the "communitarian" one, whose conception of the citizen has been broadened beyond the monad, to the extent where, in one case, a civic obligation is removed; in the other, certain avenues to citizenship itself are afforded—and both on account of an individual's attachments. And, of course, when one contemplates the historical differences in the moral behavior of the two societies, it is impossible to exaggerate the centrality of their different witness and immigration laws, and hence of the different conceptions of the citizen which underlie them.

TAKEN TOGETHER, *Delusion* and *Distributive Justice* suggest the outlines of a critical debate that is not right now occurring, a debate between communitarians and liberals that liberals have not yet joined. Liberals have yet to insist that the political concepts and categories of the liberal order—rights, justice—be presumed, and then explore ways in which these concepts and categories can be made to accommodate a citizen of some psychological complexity, a

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

self with desires for both autonomy *and* community. To do so would be to uphold, as liberalism historically has done, those traditional concepts which have created social boundaries between individuals, while pursuing its project of psychological openness. Instead, many liberals are fruitlessly debating the social order in terms of sickness and health, possessiveness and potential, normality and perversity, while talking about individual psychology in terms of transcendence and encumberance. But then, as has often been said, a liberal is someone who refuses to take his own side in an argument.

Andy Stark is a policy advisor to the prime minister of Canada.

Exceptional Regulation

R. SHEP MELNICK

Pietro S. Nivola: **The Politics of Energy Conservation.** *The Brookings Institution. 294 pp. $32.95.*

David Vogel: **National Styles of Regulation: Environmental Policy in Great Britain and the United States.** *Cornell University Press. 325 pp. $39.95.*

REMEMBER "American exceptionalism"? According to many comparative studies, what distinguishes the United States from other advanced industrial democracies is its attachment to the free market, its ideological consensus, and its distrust of large government. Yet a number of recent studies have shown that regulatory policy is far more stringent, more adversarial, and more ideological in the United States than in Western Europe. Two recent books, Pietro Nivola's *The Politics of Energy Conservation* and David Vogel's *National Styles of Regulation*, contribute to this assault on the conventional wisdom and provide a more accurate picture of contemporary American politics.

The subject of Nivola's book is not (as the title might suggest) such nickel and dime forms of conservation as tax credits for wood-burning stoves and presidential requests for lowered thermostats. Rather, it is about the more important debates over market-based pricing of oil, natural gas, and electricity. Nivola argues that "nothing works better than higher prices to enhance energy efficiency," and asks why the U.S.—in marked contrast to Western Europe and Japan—tried to insulate consumers from rising world energy prices in the 1970s. Focusing on environmental policy, Vogel makes explicit a comparison implicit in much of Nivola's work. While British regulatory policy has profitted from extensive government-business cooperation, American regulation has become highly contentious, for-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

mal, and inflexible. Behind U.S. policy, Vogel writes, lies a sense of moral outrage absent in Britain: "Threats to the public's health and safety have not been seen, as they are in Britain, as an inevitable component of production and consumption . . . [but] have become identified with the profit motive of America's largest firms." This buttresses Nivola's central argument, that Congress imposed and retained extensive energy price controls largely because its Democratic majority saw rising energy costs as further evidence of price gouging by large oil companies. In both policy arenas, the freest private enterprise became the fairest political game.

WITH REMARKABLE THOROUGHNESS Nivola examines the causes of congressional opposition to the deregulation of oil and natural gas, marginal cost pricing for electricity, and higher gasoline taxes. Using both quantitative analysis and detailed case studies, he provides convincing evidence that the most common explanations of American energy policy in the 1970s—those focusing on interest group activity, regional conflict, public opinion, and the ineptitude of Presidents Ford and Carter—are all seriously deficient. Energy policy resulted from partisan, ideological conflict. "At the core of the oil and gas deregulation conflicts," he concludes, "lie contrasting images of the role of government."

Among the most interesting parts of Nivola's book are the discussions of interest groups' influence. Interest groups did not dominate energy policymaking—though not for want of effort. Congressional votes on deregulation did not match the location of various economic winners and losers because the distribution of costs and benefits was so complex. Some oil refiners, jobbers, and consumers benefited from regulation, but others were hurt. Nivola shows that regulatory controls "affect[ed] sectors of the petroleum business in diverse, often unanticipated ways." To complicate matters further, some of the clear winners were located in the same congressional districts as their competitors and major producers, reducing their political influence significantly. Interest group fragmentation and diversity was even greater in natural gas policy. Some industries and regions benefiting from price controls feared shortages and were willing to accept higher prices in return for assured supplies. Others continued to cling to price controls. In only a few states—primarily in the consuming Northeast and the producing Southwest—did most of the pressures point in the same direction. Elsewhere the "local balance sheets" were "fuzzy," and members of Congress were "forced to make judgements." Energy policy can be considered "the moral equivalent of civil war" (as some economists have claimed) only if one has Lebanon in mind.

NIVOLA'S description of energy deregulation provides contemporary support of James Madison's famous claim: "Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a com-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

mon motive to invade the rights of other citizens . . . [and] more difficult for all who feel it to discover their own strength, and to act in unison with each other." But Madison would have been disturbed to learn how rigid ideologies intrude into the debate over the public interest. As Nivola puts it, "Where benefits and costs of a policy are characterized by indeterminacy . . . legislators tend to burrow deeper into partisan molds." There was more involved in energy politics than just demogoguery by Democrats preying on widepsread public belief that the oil companies had manufactured the energy crisis. A number of key Democrats adhered fervently to "the price regulator's *Weltanschauung*," believing that there has never been a free market for energy, that both supply and demand are highly inelastic, and that decontrol would only redistribute huge amounts of money from consumer to producer. To them, *equity* was the real issue. These hardliners were not "new class" Naderites (in fact, consumer groups played only a minor role in energy regulation) but mainstream Democrats led by that scourge of McGovernism, Scoop Jackson.

Two factors strengthened the conviction of those who questioned the equity of deregulation. The first was the "supply side bias" of Republicans and those Democrats representing producing states. The political right refused to make the best argument in favor of decontrol: that it would efficiently and effectively promote conservation. Not only did deregulation advocates fear supporting price increases openly, but they were locked into a producer mentality. Their motto was proclaimed by the head of the Texas Railroad Commission when he announced, "This country did not conserve its way to greatness. It produced itself to greatness." The key political problem facing deregulators was that the link between rising prices and increased supply was highly speculative. In effect, the right asked centrist Democrats to accept huge income transfers on the basis of faith alone. Moreover, many Democrats doubted whether those who had previously supported the oil depletion allowance, import quotas, and various energy pork barrel projects were genuinely devoted to free enterprise. This, of course, was not the only time Republicans have invited charges of hypocrisy and unfairness by making a speculative "supply side" argument to avoid mentioning painful remedies.

The second factor strengthening Democrats' attachment to a regulatory regime was their dissatisfaction with existing tax and welfare programs. Price controls are a poor instrument for combatting poverty. But with welfare reform dead and the income tax system declared by President Carter to be "a disgrace to the human race," any program promising redistribution from rich to poor (or at least from rich to middle class) looked good in the 1970s. Energy policy became not "the moral equivalent of war," but, to use Nivola's apt phrase, "the functional equivalent of social services." In short, the very weakness of the American welfare state gave force to ideological regulatory battles.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

DAVID VOGEL'S DETAILED DESCRIPTION of British environmental policy helps those familiar with American social regulation recognize just how partisan and ideological these policies, too, have become. The British approach to pollution and control is Theodore Lowi's worst dream come true. The Alkali Inspectorate (even its name seems archaic) follows virtually no uniform standards, setting emission limitations on a plant-by-plant basis. These limitations are negotiated by government officials and business technical personnel with little oversight by Parliament, Cabinet ministers, courts, or other public representatives. The Alkali Inspectorate can impose few penalties, and relies almost entirely on voluntary compliance. It makes very little information available to the public. In fact, Vogel writes, most Britons "have never heard of the Alkali Inspectorate." Yet Britain has a relatively good record of air pollution control, and a water pollution record better than that of the U.S. As one British inspector put it, "The Americans take a big stick and threaten, 'Solve your problems.' We say to industry, 'Look, lads, we've got a problem.' In this way we've got industry well and truly tamed." It is all very gentlemanly.

Vogel is quick to point out that this cooperative approach would not work well in the United States. In fact, he sees a connection between British industry's pliancy and its lack of competitiveness. British businessmen, he claims, have a "cartel-like mentality," sacrificing competitiveness for social acceptability. With the more aggressive—and successful—U.S. business community, formal rules must take the place of social pressures: "the *Federal Register* represents America's substitute for the Queen's Honor List."

Since the bulk of his book is devoted to describing and explaining this striking difference in regulatory "style," it is surprising that Vogel also claims that these contrasting styles do *not* lead to different "outcomes." Vogel is careful to explain the difficulties of measuring the effectiveness of regulatory regimes. The magnitude of countries' environmental problems varies tremendously. Britain burns more coal but can more easily export its pollution to Scandinavia. The United States is more reliant on the automobile, but has a lower population density. How can one ever know whose approach is more effective in minimizing pollution levels, or, more importantly, in reducing health risks?

Vogel asserts that the two countries "have made comparable progress in improving air and water quality," or at least that there is no evidence one country's policy "has been significantly more or less effective than the other." He correctly points out that, after writing tough formal rules, the U.S. Environmental Protection Agency often does the same thing the Alkali Inspectorate does: negotiate plant-by-plant rules based on "best practical means." Yet Vogel tends to ignore the harsh and easily enforceable requirements placed on *new* facilities in the United States. Many economists have argued that hard-to-measure opportunity costs such as these are the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

greatest price we pay for environmental protection. Moreover, Vogel's impressive and far-reaching review of other regulatory arenas (occupational safety and health, vinyl chloride, chemical and drug regulation, and regulation of the banking, securities, and insurance industries) provides a number of instances in which American regulation is clearly more stringent and costly than the British system is. One cannot help but believe that these contrasting regulatory styles produce significantly different outcomes.

BRITISH AND AMERICAN regulatory "styles" are more than alternative means for achieving the same ends. They grow out of different political contexts and carry different political meanings. Consider, for example, the fact that the two fastest growing environmental organizations in Britain are the Royal Society for the Protection of Birds and the National Trust, the latter attracting members by providing discount tickets for tours of stately homes. Parliament's small contribution comes not from the House of Commons but from the House of Lords. Environmental protection has a quaint, distinctly upper-crust accent in Great Britain. Labourites and Tories alike have preferred jobs to amenities. In Whitehall, Vogel writes, "the national interest is almost invariably defined in economic terms—often specifically in terms of the balance of payments." The cause is easy to locate: In 1967 the "greatest seabird disaster in British history" called public attention to environmental issues; recently the greatest economic slide in British history has fixed attention on another, more pressing disaster.

Only a rich and growing nation can afford strict environmental controls and sustain a coalition of environmentalists and labor. Environmentalists in the United States have benefited not only from the strength of our economy, but also from a number of political factors. Our weak class divisions have made it easier for upper middle-class preservationists to join forces with labor to do battle with corporate polluters. Moreover, America's lack of socialist or feudal traditions has strengthened environmentalism in at least two ways. First, as Vogel explains, "the energies that in Great Britain and other European nations went into challenging the power of the landed aristocracy, the clergy, and other pillars of the establishment" in the U.S. emerged as a populist, egalitarian effort to tame "big business" through extensive regulation. Second, what Vogel terms "the notion that 'industry causes cancer'" is easier to sustain without nationalized industry. It is no accident that the public Tennessee Valley Authority has been one of the most recalcitrant polluters in the United States. The mission of the TVA, providing cheap power and promoting economic development in a depressed area, has proven to be a more serious barrier to pollution reduction than has the profit motive.

British political structures—which American liberals for years regarded as the most appropriate for promoting energetic government—have made it difficult to put such second-tier issues as envi-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ronmental protection on the political agenda. Members of Parliament have neither the incentives nor the resources to engage in the type of policy entrepreneurship common among members of Congress. The British courts have refused to second-guess the more highly regarded British bureaucracy. Downplaying these institutional differences, Vogel fails to note that the central executive in the United States has shown little more enthusiasm for environmental protection than has its British counterpart. Paradoxically, divided government has led to *more* regulatory activity, not less. Democrats in Congress have used environmental issues to attack Republican presidents (Democrats having occupied the White House only four years since Earth Day), and presidents have found it easier to switch than fight. Indeed, Congress demands more than it wants in order to blame the executive for failing to comply with the law, while the courts demand more than anyone wants because they are oblivious to consequences. And widespread public participation has destroyed governmental accountability and removed incentives for moderation and compromise.

THE WORK of Nivola and Vogel demonstrates that American energy and environmental policies reflect discontent with capitalism. In this century, Americans have sought to reduce inequality and salvage individualism from "the curse of bigness," not by nationalizing industry, but by imposing regulations that deal most harshly with the biggest and most visible firms. The electoral need to appeal to a large middle-class has moderated this anticapitalist impulse. Those promoting energy and environmental regulation have promised benefits cutting across class lines, rewarding *all* "consumers" and "breathers." In this way regulation resembles Social Security, which bought political support by refusing to target benefits to the most needy, and which deftly managed to align the welfare state with a highly individualistic, even antigovernment, ethic. The imposition of extensive regulatory controls in many areas has recently led to a counterattack by business-oriented conservatives who claim that the middle class will receive even bigger benefits (gushing oil wells, plummeting inflation, and plentiful jobs) by unleashing private enterprise. Public policy leans first in one direction, then in the other. The United States may have no socialist tradition. But the debate between capitalism and its critics still manages to emerge, though in distinctly American garb.

R. Shep Melnick is an associate professor of politics at Brandeis University and author of Regulation and the Courts.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Constitutional Enmities

JEREMY RABKIN

Stephen Macedo: **The New Right v. The Constitution.** *Cato Institute. 60 pp. $7.95.*

Antonin Scalia and Richard Epstein: **Two Views on Judicial Activism.** *Cato Institute. 16 pp. $4.00.*

LORD MACAULAY, who had mastered a great many intricate partisan maneuvers in his historical research, perceived an inner logic in party conflicts. It is "in the nature of parties," he observed, "to retain their original enmities far more firmly than their original principles." This makes for a good deal of hypocrisy and confusion at times, but it is not altogether a bad thing. For partisans often show better sense in choosing their targets than they do when reaching out for "principles" with which to assail those targets.

Though Macaulay was thinking primarily of popular or electoral parties, his observation often seems to be more apt in regard to intellectual parties. That is because the "principles" of the latter are usually more remote from the actual concerns of the partisans. For the same reason, it may also be true of intellectual parties that their lack of "firmness" in their "original principles" is more often cause for relief rather than regret. In any event, the record of most intellectual partisans in the great constitutional battles of this century certainly does bear out the truth of Macaulay's dictum.

The most obvious example is still in some ways the most striking illustration of the pattern. For decades before the New Deal, progressive opinion had taken a dim view of the Supreme Court's "activist" role in enforcing constitutional limitations on elected legislatures, particularly where these limitations were not plainly and unavoidably required by the text of the Constitution. When President Roosevelt was finally able to appoint a majority of justices loyal to this

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

view, the Court proceeded in short order to junk decades of precedent to shield regulatory and redistributive measures from constitutional attack. In later years, however, many of these same justices decided that they were not, after all, opposed to judicial creativity or to judicial defiance of the majority; they were simply opposed to the particular doctrines and policies advanced by the old Court in defense of property rights, economic liberty, and the autonomy of the states. Most scholars who shared the "original enmity" of the New Deal appointees moved in the same trajectory and found little to criticize in the liberal activism of the Warren Court. And for all its intellectual sloppiness, for all its manipulative play with "principles," the Warren Court did, in truth, help to secure some very significant reforms in American public life.

THE BURGER COURT was in most respects a continuation of this pattern. Indeed, compared with the Warren Court, the Burger Court actually pursued a far more reckless course in some areas—as when it overturned the abortion laws of all fifty states, when it demanded long-distance busing for school integration, and when it embroiled itself in the minutia of church-state relations. By the late 1970s, provincial snarling at Earl Warren had evolved into an organized body of conservative opinion, with respectable intellectual leadership. Now it was the right which hammered at the undemocratic character of judicial review and the presumption of judges making policy not clearly justified by the Constitution. With the election of Ronald Reagan in 1980, adherents of this view moved into key positions of influence in Washington and began to be appointed to lower courts throughout the country. With the recent elevation of William Rehnquist to the position of chief justice and Antonin Scalia to associate justice on the Court, this view seems within reach of taking over the Supreme Court itself.

The prospect has upset many liberals. It also seems to dismay the libertarian Cato Institute, which has issued two volumes—more accurately described, perhaps, as large pamphlets—attacking the doctrines of judicial restraint espoused by the Reagan administration and most of its recent appointees. The packaging of these volumes is a bit sensational, as the title of Stephen Macedo's book, *The New Right* v. *The Constitution*, indicates. But Macedo, recently appointed assistant professor in the Harvard Government Department, and Richard Epstein, professor of law at the University of Chicago, are both thoughtful and informed critics. Both of these little volumes are interesting and intelligent. It remains to be seen, though, whether they are debating genuine adversaries.

Macedo's polemic does not, to be sure, follow in the tradition of candidate Mondale and treat the Rev. Jerry Falwell as the guiding light of Reagan's judicial policy. Macedo reserves his fire for the speeches of Attorney General Meese and other Reagan administration officials who demand a jurisprudence of "original intent," and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

for the somewhat more sophisticated arguments of academic advocates like Robert Bork (now a judge on the D.C. Court of Appeals) and Professor Lino Graglia. Some of Macedo's targets may feel that he has misrepresented or oversimplified their views in particular instances, but on the whole his critique strikes me as essentially to the point. It also has the merit, I think, of being essentially correct in its critique of the claims for a jurisprudence of "original intent."

MACEDO'S COMPLAINT is not the usual one that the specific intentions of the Constitution's Framers are too hard to determine at this distance. Rather, his central point is that the Framers themselves did not accept the positivist perspective which makes the intentions of the lawmaker the first and last word in interpreting a law—and if they had, they would scarcely have written a Constitution in the very brief and general phrases actually employed in its principal guarantees. Macedo does not argue for a "living Constitution" that judges may alter at will to comport with their own values —he derides Justice Brennan's reading of the Constitution as "no less partisan and selective than that of the New Right"—but he does insist that the Constitution cannot be properly interpreted without regard for the moral and political principles, the larger theoretical vision, that stands behind its particular guarantees. The demand that the Constitution be confined to the particular, demonstrable intentions of the Framers is usually linked (as Macedo shows with copious quotations from his targets) to an insistent skepticism about moral argument and reasoning from principles. And while this skepticism is usually advanced as an explicit defense of the majority's right to make its own choices, it leaves majority rule or democracy itself without adequate moral foundation.

The trouble with Macedo's argument is the trouble with almost all "natural law" or "higher law" theories (and Macedo is quite explicit in linking his views with the "natural law" traditions of Locke and Blackstone). It is necessarily vague in its contours and tends to fall back on moralistic rhetoric as a way out of the awkward indeterminacy of particular cases. Thus Macedo expresses indignation at Judge Bork for seeing "no serious moral problem but only a question of 'sexual gratification'" in the constitutional challenge to Connecticut's prohibition on the sale of contraceptives. But he makes no effort to explain what else was at stake in this case—as if the moral claim to use contraceptives were entirely self-evident and views regarding "sexual gratification" had nothing to do with the matter. His reticence probably has a great deal to do with the difficulty of drawing any clear lines once one acknowledges that government may indeed legislate some limits on consensual sexual conduct (a premise that Macedo himself does not venture to contest, though the Cato Institute might). It is just this kind of problem, of course, which accounts for the continual appeal of textual positivism and democratic majoritarianism.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

RICHARD EPSTEIN, who offers a brief supportive introduction to Macedo's book, maintains a somewhat similar reticence in his debate with Judge Scalia. Even so, however, it is a rather one-sided debate. Scalia argues against judicial activism on behalf of economic liberties on the ground that this will encourage judicial activism in other areas, where it is far more distressing to conservatives. But he does not specifically refer to Epstein or any other advocate of greater constitutional protection for property rights and economic liberty. Epstein's presentation, by contrast, is couched as an explicit —if impeccably courteous and respectful—attack on Scalia.

Epstein concedes that there is much that is troubling about the spectacle of judges attempting to run school districts, exercising ongoing control over public institutions, or demanding that Congress appropriate new funds to satisfy some fanciful egalitarian doctrine. But in the field of economic regulation, he insists, there are "many blatantly inappropriate statutes that cry out for a quick and easy kill" by judges enforcing constitutional provisions "designed to preserve definite boundaries between public and private ordering." But the heart of Epstein's argument is that it makes no sense for the courts to take such a militant stand in defense of free speech and other liberties, while remaining entirely indifferent to legislative incursions on property rights and economic liberties. The argument derives its force from the assumption that no one would really want to see constitutional protections for free speech and other liberties entirely neglected by the courts. But, like Macedo, Epstein makes no effort to define these other liberties which courts must defend.

Is the Cato Institute right, then, to fear that a Court dominated by Rehnquist and Scalia—assuming they do become the core of a new majority—will continue to neglect property rights and economic liberties in the name of popular sovereignty and a highly constrained view of judicial authority? Are libertarians justified in fearing that the same dogmas would impel a Reagan Court to abandon all noneconomic rights and liberties established or expanded by the Supreme Court in recent decades? One can, I think, regard such a radical retrenchment of constitutional doctine as undesirable without thinking it at all likely.

MANY OF TODAY'S PARTISANS of "original intent" really seem to be aiming at a few key decisions, like the Court's very extreme stand on abortion. Most of the current animus against "judicial activism" would probably be satisfied by the scaling back or overruling of such extreme Burger Court positions. And there are reasons for supposing this will not go too far. One is that it would be an extremely radical and convulsive course for the Court to disavow all precedents not indisputably and unavoidably required by the text of the Constitution or by the demonstrable "intent" of the Framers. It is hard to conceive that men of such conservative temper as Rehnquist and Scalia would follow the incendiary example of the Roose-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

velt Court and attempt to cut through the constitutional jurisprudence of decades at a stroke. Even Richard Epstein, who is probably more doctrinaire than anyone about the rights of property, concedes in his critique of Scalia that "courts are bound to some extent by a larger social reality [and] . . . cannot pretend that the New Deal never happened." Another reason for caution is that a doctrinaire insistence on original intent would not satisfy the underlying objection to the most controversial Burger Court decisions. Most of the serious opponents of *Roe* v. *Wade*, to cite the leading example, want to see a constitutional affirmation that states may protect unborn life and not a technical, positivist ruling that the Constitution is altogether neutral or silent regarding the right to life in this context.

For somewhat similar reasons, one suspects that a Reagan Court will not remain entirely deaf to the appeals of advocates for property rights and economic liberty. In his contribution to the "debate" with Richard Epstein, Judge Scalia himself derides the "pernicious notion . . . represent[ing] a turn of mind that characterizes much [contemporary] American political thought . . . that economic rights and liberties are qualitatively distinct from and fundamentally inferior to, other noble human values called civil rights . . . as though economics is a science developed for the benefit of dogs or trees; something that has nothing to do with human beings, with their welfare, aspirations, or freedom."

This insight is likely to carry increasing weight with a Reagan Court, I think, for all the present disavowals of judicial activism of any sort. It is not only the precedent of post-New Deal jurisprudence that suggests this but the provocation in it. For in truth it is too simplistic to say that post-New Deal jurisprudence was built simply on an "enmity" to the old constitutional protections for property: if there was something a bit hypocritical and opportunistic about the egalitarian and libertarian "civil rights" doctrines built on this "original enmity," there was also a certain dream world logic in the trajectory of post-war jurisprudence. Where the old, pre-New Deal jurisprudence had a flinty, Calvinist edge to it, equally solicitous of laws protecting public morals as of constitutional doctrines protecting private property, the jurisprudence of the post-New Deal justices came in time to display the same utopian impatience with laws and limits, in economics as in morals. The combination of broad indulgence toward welfare state redistribution measures and fierce support for "self-expression" was not, after all, an idiosyncratic whim of Justice Douglas or Chief Justice Warren or Justice Brennan. It was the political faith of an entire generation of liberals.

IF MANY CONTEMPORARY CONSERVATIVES have adopted the rhetoric of judicial restraint, one suspects that is largely because it was so easy to come by—having been tossed around for so long by an earlier generation of liberals. It is hard to avoid the suspicion, how-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ever, that their animating "enmity" is nothing quite so abstract as "judicial activism" and that they have been provoked, rather, by those utopian impulses of contemporary liberalism which became so entrenched in the judiciary in the 1970s. And like constitutional partisans of the past, the Reagan appointees and their followers may indeed prove more faithful to this "original enmity" than to their currently professed principles of judicial restraint.

Jeremy Rabkin is an assistant professor of government at Cornell University.

The Constitutional Citizen

MICHAEL S. TEITELBAUM

Peter H. Schuck and Rogers M. Smith: **Citizenship Without Consent: Illegal Aliens in the American Polity.** *Yale University Press. 173 pp. $22.50 cloth, $6.50 paper.*

OVER THE PAST two decades, Western nations have been increasingly vexed by international migration. Immigration issues now have permeated deeply into the domestic politics of France, West Germany, and Great Britain, and in recent years all of these countries have undertaken major reforms in their policies regarding immigration and refugee admissions.

Meanwhile, in the United States the debates surrounding immigration have focused heavily upon illegal immigration, an issue that has confounded the Congress for more than fifteen years. Immigration trends are of special interest to the United States, given that this single country accounts for well over half of the world's immigrants and refugees admitted for purposes of permanent settlement, and is now the principal destination for immigrants from numerous countries.

The issues involved in international migration go to the very heart of nationhood. Controlling admission of noncitizens is normally considered one of the universal attributes of state sovereignty, along with the right to provide for the national defense and to raise revenues. A government unable to control entry by nonnationals, defend itself against other nations, or raise revenues for its operations would normally be viewed as nonsovereign. Recent international immigration trends thus raise significant issues about the very meaning of citizenship and nationhood, the principal focus of this new scholarly book from two Yale professors.

IMMIGRATION ISSUES are not only of interest to constitutional lawyers, political philosophers, and immigration specialists. Schuck and Smith show that immigration policy played a significant role in

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the formulation of the Declaration of Independence, the U.S. Constitution, the Fourteenth Amendment, and the Dred Scott decision; it was also treated in the political writings of John Locke, Jean-Jacques Rousseau, Thomas Jefferson, Niccolò Machiavelli, and George Washington. Moreover, American law and practice regarding citizenship are deeply intertwined with the history of slavery, the American Civil War, the Reconstruction, and the legal status of American Indians.

The fundamental principles of citizenship discussed in this book take us back to a great divide in European political philosophies that emerged in medieval times—that between the notion of citizenship by ascription and citizenship by consent. Until the seventeenth century, English Common Law had long assumed that all persons born in the dominions of the Crown were English subjects owing allegiance to the monarch—a plausible perspective for an island nation with few aliens entering or citizens living abroad. In the seventeenth century, this somewhat unformed presumption was elaborated and codified by Sir Edward Coke in an opinion on the Union of England and Scotland under King James I. Coke appealed to "natural law" as the justification for citizenship as a birthright, derived primarily from the extent of protection the child received from the monarch. Thus, children born to soldiers of an alien army occupying England would not be British citizens, but children born abroad to the King's ambassadors would indeed be British. The paramount concern of such considerations was the question of allegiance owed by a subject to the medieval monarch, a commitment seen by Coke as established at birth and lasting throughout the lifetime of the subject.

The principal contesting view was that of citizenship by mutual consent, as put forward by Rousseau, Montesquieu, and Locke. Such views arose out of the Enlightenment and its accompanying challenge to the patriarchal absolutism of the medieval system. In this view, citizenship (and consequent loyalty to the monarch) could not be acquired at birth, but only by the informed consent of which only adults were capable. Thus Locke wrote:

> [A] Child is born a subject of no Country and Government. He is under his Father's Tuition and Authority, till he come to Age of Discretion; and then he is a Free-man, at liberty what Government he will put himself under; what body politick he will unite himself to.

The philosophical differences could hardly be more clearly drawn: "ascription" holding that lifetime citizenship attaches from the place or other aspects of birth; the "consensual" view holding that citizenship derives from mutual consent and hence cannot be seen as a permanent commitment.

BUT HOW DOES such a deep question of political theory emerge out of the tawdry special-interest politics of recent U.S. immigration policy, so dominated by the economic interests of California

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tomato growers and the political ambitions of ethnic activists? The connection is a simple one. Under current American practice, mere birth within United States territory, even to a woman who deliberately entered the country illegally for this sole purpose, has simply been assumed to entitle the newborn to automatic U.S. citizenship as a matter of birthright. It is clear enough that such a view would have appalled Locke, whose intellectual contributions played such a central part in the American Revolution. For Schuck and Smith, who are apparently political liberals and supporters of liberal policies regarding admissions of immigrants and refugees, such a practice violates two quite basic principles: The first is that democratic governments rule by consent of the governed; the second is that admission of noncitizens to the polity must be with its consent, rather than through unlawful actions by would-be members.

Going back to first principles, the authors note the prominence of the consensual view in the American Revolution, whose Declaration of Independence was patterned after Locke. The pure consensualism of the Declaration was tempered in the Constitution, whose framers wished to assert the allegiance of all native-born residents, thereby assuring military manpower in time of crisis and justifying the expropriation of Tory property. Later on, further ambiguities in this inchoate notion of "birthright" citizenship arose out of the uncertain nationality rights of American Indians, and most profoundly from the treatment of native-born blacks. In the infamous Dred Scott decision of 1857, the Supreme Court ruled that no one of African descent, whether slave or free, could be a U.S. citizen by birth. Thus did a sharp reversal of the argued citizenship by birthright arise out of the negative interests of slavery and racism.

In the aftermath of the 1860-65 Civil War that followed, the Reconstruction Thirty-ninth Congress sought to overrule the Dred Scott decision in the Civil Rights Act of 1866, and soon after in the Citizenship Clause of the Fourteenth Amendment. The explicit goal of both was to grant citizenship to native-born blacks. There were several wording changes during this legislative process, with the ultimate formulation in the Fourteenth Amendment reading as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." It is this clause that has given rise to the largely unexamined assumption that any person born under any circumstances within U.S. geographical boundaries is entitled to citizenship.

SCHUCK AND SMITH'S major contribution is to provide a serious analysis of the reasoning and intent of this Citizenship Clause. They conclude that the birthright citizenship provision was meant to be sharply qualified by the jurisdiction requirement ("and subject to the jurisdiction thereof"). The Framers' intent, in this view, was to narrow the scope of the birthright principle by imposing a

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

requirement of consent. Thus, the authors conclude that since illegal aliens' presence within the United States is, by definition, without the consent of American law, and since aliens owe allegiance to and benefit from the protection of their own nation of citizenship, their newly-born offspring could in no sense be entitled to citizenship by birthright. They write:

> It is difficult to defend a practice that extends birthright citizenship to the native-born children of illegal aliens. The parents of such children are, by definition, individuals whose presence within the jurisdiction of the United States is prohibited by law. They are manifestly individuals, therefore, to whom the society has explicitly and self-consciously decided to deny membership. And if the society has refused to consent to their membership, it can hardly be said to have consented to that of their children who happen to be born while their parents are here in clear violation of American law.

Schuck and Smith describe the assumption that such citizenship is somehow guaranteed by the Fourteenth Amendment as "one of the most sacrosanct but least examined American political institutions." They note that birthright citizenship for children of illegal aliens was simply never considered by the Congress as it debated and adopted the Amendment. Since unrestricted immigration was encouraged in 1866 and there was no such thing as an illegal alien, the issue simply never arose. Instead, the intent of the post-Civil War amendment was to reverse the Dred Scott decision regarding the citizenship rights of native-born blacks. Moreover, to date "no court has ever squarely decided the question of the status under the Citizenship Clause of the native-born children of illegal and nonimmigrant aliens."

Whether or not Schuck and Smith's analyses and conclusions prove convincing to legislators and jurists still in the thrall of unexamined assumptions, their book must be counted as a major contribution. It offers a dispassionate and objective analysis of an important ambiguity of American constitutional law and immigration policy. It provides an erudite and balanced discussion of profound matters such as the obligations of the state to its citizens and noncitizens, the reciprocal obligations of citizens to their nation, and the rights and statuses accruing to individuals by accidents of birth and inheritance. In the end, Schuck and Smith offer a concise yet compelling interpretation of the largely unexamined meaning and congressional intent of the Capital Citizenship Clause of the Fourteenth Amendment, which in recent years has become an important avenue for deliberate abuse of American immigration laws. This admirable book deserves to be taken very seriously by anyone interested in constitutional rights, political philosophy, or the future of U.S. immigration policy.

Michael S. Teitelbaum is program officer of the Alfred P. Sloan Foundation.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Taking the Constitution Seriously

MICHAEL S. GREVE

Ronald Dworkin: **Law's Empire.** *Harvard University Press. 488 pp. $20.00.*

Richard Epstein: **Takings: Private Property and the Power of Eminent Domain.** *Harvard University Press. 384 pp. $25.00.*

THROUGHOUT AMERICAN HISTORY, the exercise of judicial review has been accompanied by debates about its legitimacy and proper scope. Liberalism's tension between majority rule and individual rights has framed the question; ideological sympathies have usually supplied the answer. Since *Brown* v. *Board of Education*, virtually the entire legal profession has celebrated judicial forays into defining new constitutional rights, supporting "public interest" litigation, and shaping remedies that required continual judicial oversight. Just as persistently, conservatives have pointed out that the constitutional moorings of judicial rulings concerning abortion, busing, and racial quotas are fragile at best, and that, without a sound constitutional basis, unelected judges have no business interfering with democratically adopted policies.

These battle lines have recently begun to crumble. As the composition of the federal judiciary is becoming increasingly conservative, liberals and conservatives alike are reexamining their long-held beliefs about the proper scope of judicial authority. Former advocates of "judicial imperialism" are scrambling to reclaim the ground of judicial restraint and strict adherence to precedent. Attempts to rescue the results of liberal jurisprudence from a more literal and restrictive reading of the Constitution have surfaced in law journals, and political commentators from Michael Kinsley to Anthony Lewis have complained about instances of "right-wing judicial activism."

At the same time that liberal support for a freewheeling judiciary has ceased to be unanimous, some conservatives have come to question the value of judicial restraint. At a recent conference sponsored by the Cato Institute, for example, conservative and libertarian scholars expressed widely divergent views about the role of the judiciary, and the spectrum included extraordinarily "activist" conceptions. And at least some lawsuits brought by conservative public interest law firms indicate that these organizations would probably welcome a judicial activism of the "right" kind.

In short, the constitutional debate has become more interesting —and considerably more confused. The discussion is conducted almost exclusively in terms of "activism" versus "passivism," "interpretivism" versus "noninterpretivism," or—the latest addition to the roster—"original intention" versus the "living Constitution."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

But it is becoming obvious that these metatheories about judicial behavior make little sense unless they are based upon a plausible substantive theory of the Constitution. Without such a theory, for instance, one cannot tell an activist from a passivist judge.

"ORIGINAL INTENTION" may seem a step in the right direction. But while the Founders' intentions are certainly relevant to constitutional interpretation, they do not provide us with a complete theory. The historical record frequently creates confusion around the constitutional text, instead of clarifying it. Besides, the framers knew that they could not know the future, which is why they wrote a Constitution containing broadly worded phrases (along with very special provisions). And since hardly anyone today wants to follow *every* one of the Framers' intentions, "original intention" offers no solutions to these problems. It, too, is a metatheory about adjudication, and therefore a shortcut around what should be the core of the debate: substantive constitutional theory.

Such a theory is not possible without an even broader inquiry. Since the circumstances to which the Constitution is applied have changed dramatically, and since the text itself is not self-explanatory, its interpretation must be grounded in a more general theory about the political and legal principles on which it is based. Richard Epstein and Ronald Dworkin agree on the need for such an undertaking, if not on much else. Both authors voice their dissatisfaction with the state of contemporary jurisprudence. Both dismiss "activism" and "original intention" as unsatisfying answers to the problems of constitutional interpretation. And both use seemingly narrow concerns as vehicles for ambitious constitutional theories that combine philosophical, political, and jurisprudential elements.

Epstein's *Takings* is primarily a detailed analysis of the takings (or eminent domain) clause of the Constitution. But the author appropriately characterizes his book more broadly as "an extended essay about the proper relationship between the individual and the state." Dworkin's main concern in *Law's Empire* is the problem of "hard cases"—that is, cases in which existing law does not provide a full answer to the legal question at hand. How should courts decide such cases? How can citizens be bound by judicial decisions even if previously existing law is silent or ambiguous? These questions are only the starting point for a vastly more ambitious enterprise: a full-blown theory of jurisprudence and its foundations in a political theory about institutional virtues and the good society.

LAW'S EMPIRE represents by far the more abstract analysis. While Epstein examines scores of cases, many of them in detail, Dworkin's interest in constitutional or case law is rather limited. His argument is largely based upon a sample of four "hard" cases. (Dworkin has not even read these too carefully. He contends that one of his examples—the notorious "snail darter case"—was decided under

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the Environmental Protection Act, a nonexistent statute.) Dworkin argues, quite persuasively, that judges who decide hard cases, and people who argue about them, commonly assume that there are better or worse decisions, not just different ones. A skeptical attitude towards hard cases—"there are no right answers"—is therefore inadequate. It is similarly implausible to claim that there are "gaps" in the law. This conception would mean that rights and responsibilities are allocated, not on the basis of law, but on the basis of judicial fiat.

The answer to the problem of hard cases, Dworkin claims, is a conception of "law as integrity," which

> argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification.

Dworkin argues that law as integrity not only makes sense of our legal practices, but also fits closely with the kind of polity we want to be. According to Dworkin, we do not want to be a mere collection of individuals who "play by the rules" but acknowledge no further mutual commitments. Rather, we want to be a "true community" that accepts integrity—principled decision making—in private and public life. The citizens of such a community share a commitment to justice, fairness, due process, and integrity, even though they disagree about what those principles require. Dworkin maintains that a community that accepts integrity has a better case for coercing its members than one rejecting it. "Law as integrity" has a better claim to legitimacy because it promotes the right kind of community.

Decisions that conform with "law as integrity" turn out to be hard to produce. Dworkin invents a judge named "Hercules" who decides cases in such a way that his interpretation of the law shows our legal practices in their "best light." First, he tries to find the principles that have the best "fit" with legal history; then he tries to match them with the best moral justifications of fairness, justice, and due process. This two-step approach is actually more of a balancing test: Hercules may prefer an excellent moral decision to a less attractive one, even if the latter provides a better "fit."

ALTHOUGH DWORKIN TALKS at great length about "law as integrity," it remains disturbingly elusive. We learn that Hercules is duly concerned about justice, fairness, due process, and "equal concern and respect." But since Hercules/Dworkin sees no need to organize these competing and conflicting considerations into a manageable framework of legal analysis, his general theory offers no way of telling where he would come down on a given set of cases. Dworkin himself claims that we can gain a full impression of Hercules' jurisprudence only after following his reasoning through a whole universe of cases and issues—which is another way of saying that Her-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

cules has no workable, predictable method for resolving cases. We are asked to rely on his interpretive imagination.

Not that Hercules is altogether unpredictable. Dworkin does give us a few examples of his "method," but these only make Herculean jurisprudence more objectionable. Dworkin insists that his creature is not an "activist": Hercules interprets law, whereas the activist "would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture. He would ignore all these in order to impose on other branches of government his own view of what justice demands." This is a pretty good description of the past few decades of Supreme Court jurisprudence; and Hercules, though not an "activist," manages to endorse all its results. He endorses busing (a consequence of "a perfectly traditional view of the judicial office"), racial quotas, and, apparently, abortion on demand.

However, even Hercules's imagination has its limits. His "attitude towards precedents would be more respectful when he was asked to restrict the constitutional rights [earlier decisions] had enforced than when he was asked to reaffirm their denials of such rights." This means that while the courts can invent (or "recognize") new rights somewhere in the penumbras, they are not similarly free to overturn those precedents. Justice Scalia is bound by the decisions of Justice Brennan, who, in turn, is constrained by little but his sincere effort to find the "best" interpretation of the United States Constitution.

Dworkin's judicial imperialism does not stem from the infusion of political prejudice into a basically sound theory; his theory virtually guarantees the results. His argument from hard cases does possess some force. It is indeed true that many of our legal arguments presuppose that there are better or worse solutions to hard cases, not just different ones. Any plausible theory of jurisprudence will have to account for this facet of our legal practice. But it is quite a different matter to organize an entire legal theory from this vantage point. The liberal tradition always assumed that law is essentially a system of rules for everyday life. Law is not, at bottom, about the very few cases of private or public conduct that are the subject of litigation, let alone the tiny universe of "hard" cases. Dworkin never explains why judicial reasoning in hard cases should be the paradigm of law at work. He simply presupposes it, and then argues from hard cases back to the legal system at large. For law as integrity, "easy cases are . . . only special cases of hard ones." And just as there are no easy cases, there are no clear rules to make them easy: "The description 'unclear' is the *result* rather than the *occasion* of Hercules' method of interpreting statutory texts." Now that simple, "easy" rules have disappeared from the legal system, there is room for the more rarified aspirations to "justice" and "equal concern and respect." "Law's empire is defined by attitude," Dworkin writes, an attitude at once "interpretive," "fraternal," and "protestant."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

UNDER THIS CONCEPTION, judges are no longer the impartial guardians of the law. They are comparable to "the literary critic teasing out the various dimensions of value in a complex play or poem." With one difference: When a Yale professor of literature decides that an anarcho-lesbian reading of Shakespeare's sonnets is "the best" interpretation, all things considered, no one suffers (with the possible exception of his students). When a federal judge displays similar inventiveness, his rulings have coercive force. They cannot be evaded but have to be obeyed. Dworkin goes on at length about the parallels between literary and judicial interpretation, but it never occurs to him that coercion and authority might make a crucial difference.

His failure to see this rather obvious point is doubly instructive. First, Dworkin's failure to come to grips with authority explains why he does not realize that "law as integrity" is altogether incompatible with "true community." Herculean decisions, imposed by brute judicial force, tend to do very little in the way of promoting a fraternal atmosphere. *Roe* v. *Wade* divided American society; court-imposed racial quotas have contributed substantially to a similar result. And the Boston busing case hardly made the city more of a community. The judiciary's "teasing" of the constitutional text may not always divide the community, but neither is it true that judicial inventiveness generally contributes to people's sense of community and moral responsibility. More likely, the opposite is the case.

Second, Dworkin's failure to see that authority makes a difference indicates a fundamental misunderstanding of the role of law in the liberal tradition. Liberalism has always understood law as a formal system of general rules that would tend to promote and protect freedom. Rights that are defined by general rules create perimeters within which people are free to act and plan their futures, and simultaneously constrain public power: Public officials must go through a lot of trouble before they exercise coercion. In order to fulfill these purposes, law *must* be highly formal. When rules are replaced with a muddle of "values," official coercion is more readily exercised. Law becomes unpredictable; people can no longer plan ahead, because they no longer know under what circumstances coercion will occur.

Dworkin considers the need for predictability only briefly. Rejecting the suggestion that unpredictability is unfair, he concludes that those who insist on the need for clear rules must consider unpredictability "undesirable for some other reason: that it is inefficient, for example, or imposes unnecessary risks, or frightens people, or is otherwise not in the public interest." He does not even *consider* the intrinsic connection between a formalistic legal system and personal freedom—a key component of the liberal tradition.

The fact of the matter is that neither the liberal tradition nor its concept of freedom are within Ronald Dworkin's universe. The book's elaborate index (fifteen tightly printed pages) makes no men-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tion of freedom—or liberty, or autonomy, or anything else having anything to do with limited government and freedom under law. There are a few passing references to "rights." But the rights Dworkin still claims to be taking seriously—though less fervently than he used to—have nothing to do with liberty or rules limiting coercion. They are the result of "past decisions of political institutions," which have to be interpreted in the light of "principles" such as justice and "equal concern and respect"—all "in the right relation," whatever that may be.

RICHARD EPSTEIN'S *TAKINGS* offers much needed relief from Dworkin's sanctimony and lawlessness. Epstein understands and emphasizes that the purpose of law is to preserve liberty and property, and throughout he tries to develop clear rules even for complex situations. Of course, there will always be hard cases, but "the greater danger is an acute attack of lawyers' disease. Marginal cases are the stuff of litigation; they are not the stuff of basic human arrangements. For private property, as for other concepts, the vast range of cases outside litigation is well understood in terms of the basic legal concepts." On similar grounds, Epstein condemns as "an invitation to destroy the rule of law" the idea that "vague" language is an argument for a "living Constitution" that acquires a new meaning with each generation. But he also opposes attempts to fill general clauses with "original intentions." "The best evidence of textual intention," he writes, "is the language of the text itself."

This does not mean that the "takings" (or eminent domain) clause of the Constitution is self-explanatory; rather, its text—"nor shall private property be taken for public use, without just compensation"—must be understood in the context of a broader political theory. For Epstein, Locke's theory of representative government has to be modified only slightly to provide a proper understanding of property rights and, more generally, of the relation between individuals and the state. The purpose of government is, first, to control private aggression, and, second, to overcome "holdout" and "free-rider" problems that ordinarily impede social organization and the provision of public goods. The state's legitimacy rests upon its ability to perform these—and *only* these—essential functions.

On the whole, Epstein succeeds admirably in translating this abstract theory into clear legal rules that offer solutions to most—if not quite all—questions of governmental takings of private property. He accomplishes this feat without doing violence to the constitutional text: The structure of his book closely tracks the language of the takings clause. Epstein discusses, in strict order, the concept of takings, the scope of police-power justifications, the "public use" limitation, and the question of "just compensation." And much can be said in favor of his analysis. His critique of recent Supreme Court decisions is scathing, and mostly convincing. The strategy of reading the constitutional text against the background of Lockean theory

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

is very attractive, as is the suggestion that property rights be put on a par with "personal" rights. On this basis Epstein argues against the Supreme Court's double standard of strict scrutiny in cases of "fundamental" rights, and virtually no scrutiny in cases of property rights.

Due to the sheer intellectual force displayed in *Takings*, Epstein succeeds in making unpopular and counterintuitive conclusions seem almost inescapable. His analysis leads him to conclude that scores of governmental programs, statutes, and regulations are unconstitutional. This includes many New Deal programs, most zoning laws, the progressive income tax, and virtually all public transfer and welfare payments. I suspect that very few people will feel comfortable with these stringent limitations on the use of public authority—to say nothing of the suggestion that the courts should enforce these limitations as a matter of constitutional law. The root of this problem is Epstein's unduly restrictive theory of rights, which leaves insufficient room for politics, democracy, and representation.

EPSTEIN'S LIBERTARIAN DISTRUST of politics, and his extraordinary faith in rights theory, are revealed in his selective reading of Locke's *Second Treatise*. Epstein argues that enforcement and free-rider problems are the *only* two failures of a system of private rights in the state of nature. Locke, however, believed that rights theory *itself* was defective. The "law of nature" is intelligible by reason, but it is not always known. Thus, it is also always open to interpretation. In the state of nature, in short, there "wants an established law, received and allowed by common consent to be the standard of right and wrong."

This does not make Locke a positivist; there are natural rights, including a right to property, but we cannot be certain about the precise scope of these rights. At the fringes, all rights are contestable. That is one reason why we need majority decision and representation —acceptable mechanisms for drawing lines where rights theory lets us down. Since the legislature is not the source of rights, it cannot take property or abolish it. But, as Locke makes clear, it can and must regulate the use of property.

This ambiguity regarding natural rights and their regulation in civil society has characterized classic liberalism since Locke. A perfect expression of this tradition is a passage from Blackstone's *Commentaries*:

> [An] absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land* (emphasis added).

Epstein quotes this passage, and tries to dispose of the qualification ("save only . . .") in an unpersuasive footnote. His concern is that any qualification of absolute rights will lead down a slippery slope, at the end of which property becomes the creation of the state. This

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

fear is not wholly unwarranted, but there are costs to closing liberalism's open flank: Institutionally, it reserves an extraordinary amount of power for the judiciary. Federal judges, however, are not elected, and, by Epstein's own admission, rarely have a clear sense of what they are doing.

It is true that, in some areas of contemporary constitutional law, we do leave very little room for legislative regulation. The Supreme Court's approach to first amendment issues, for example, looks a lot like the jurisprudential model Epstein outlines for property rights. It is extremely doctrinal, leaves little play at the joints, and combines a series of very rigorous tests of legislative means, "overbreadth," and motives. However, a good case can be made that this is precisely what is wrong with First Amendment jurisprudence. Even a casual examination of the Supreme Court's meandering course through establishment-clause or pornography cases indicates that judicial attempts to develop strict doctrines for practically all cases, including those that simply require good judgment, may create confusion and instability. In the Court's convoluted First Amendment doctrines, little more than symbolism is at stake, but in the area of property, the costs of disruption and instability would be much higher. Judicial attempts to apply doctrinaire concepts to property—for example, Epstein's very narrow definition of "public use"—would be subject to resentment and endless debate. And the more detailed and elaborate the doctrines become, the greater the risk of misapplication and of disagreement on and off the bench.

Epstein does recognize the problems of instability and disruption. For example, he urges judicial restraint regarding unconstitutional governmental programs that have created "reliance interests." Social Security is the most pertinent example. But, of course, Epstein senses that too many concessions would undermine a tidy and consistent theory. His book leaves the distinct impression that he underestimates the importance of politics—where social policy and rights overlap—in our wider constitutional law system.

THE FOUNDING FATHERS had a more comprehensive theory: They regarded institutional mechanisms, checks and balances, and the separation of powers, as a main safeguard of liberty. Indeed, many of the practices Epstein abhors became possible because the Supreme Court cooperated in the virtual demise of institutional (as opposed to rights-based) barriers to governmental power. For example, the commerce clause prohibited Congress from regulating commercial activity other than interstate commerce. Because the states had to compete with each other for business, they usually tried to create a favorable business climate. The commerce clause thus worked as an indirect restriction on regulation and taxation. This barrier fell in the wake of the New Deal, when the Supreme Court allowed Congress to engage in nationwide regulation of commercial activity within the states.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Founders also shaped Congress in such a way that its output would be limited: Multiple factions had to agree on any particular provision. The effectiveness of this obstacle to legislation was greatly reduced when the Court refused to scrutinize sweeping delegations of Congressional power that were couched in vague statutory language. Congressional factions no longer must agree on anything but broad statements of good intentions, and leave the details to regulatory agencies and courts. The result is an increase in legislative output.

A judicial resurrection of institutional limits to governmental power would have more support in the text and structure of the Constitution, and would therefore be less questionable than Epstein's theory of economic substantive due process in a slightly new garb. Even in combination with a somewhat higher standard of judicial scrutiny on questions of property, a rigorous interpretation of institutional limits to governmental power would not bring about a perfect system of property rights. But, in many ways, it would constitute a more plausible model of constitutional jurisprudence than does Epstein's preoccupation with rights. It would be a tribute to the Founders' insight that frequently freedom is best secured indirectly.

THE PUBLIC AND ACADEMIC DEBATE about the Constitution and the judiciary's place in American politics is more interesting than it has been in a long time. One would hope that *Takings* leaves a more lasting impact than Dworkin's paean to judicial imperialism. Epstein's liberalism may be too narrow, but, unlike Dworkin's sentimental communitarianism, it is still part of the liberal tradition. While Ronald Dworkin makes the rule of law and the Constitution dissolve into values and aspirations, Richard Epstein has made a significant contribution to a jurisprudence that, at long last, takes the Constitution seriously.

Michael S. Greve is a Ph.D. candidate in the Cornell government department. He works for a private foundation in New York.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Are Teachers Underpaid?

ALBERT SHANKER

MYRON LIEBERMAN, who once ran unsuccessfully for the presidency of the American Federation of Teachers, does not really answer the question, "Are Teachers Underpaid?" (Summer 1986). Instead, he devotes most of his article to arguing that "the teacher unions are in the business to achieve more, not less, favorable terms and conditions of employment for teachers."

This is an obvious and uncontested point; every organized group is in the business of bettering the lot of its members. Lieberman, however, sees cover-ups and conspiracies against the public interest in this pursuit. He asserts that the most common and universal salary policies in elementary and secondary education are wrongheaded, if not downright stupid, and that these policies were originated and are maintained solely because of the internal political needs of teacher unions and their leaders.

As is often the case when a villain has been predetermined, history must be rewritten to fix the source of all evil. Such is Lieberman's method. Objective historians and scholars will find a very different story in the missing facts.

Take the case of single-salary schedules—the practice of paying elementary and secondary school teachers according to the same salary schedule. As Lieberman points out, in the early 1900s school districts paid high school teachers more than elementary school teachers. But, he says, they moved toward single-salary schedules (which he doesn't like) because teacher unions demanded them after figuring out that there were twice as many elementary school teachers as secondary school teachers. "It became impossible to achieve a leadership position in teacher organizations," Lieberman opines, "without supporting a single schedule covering all grades." Furthermore, to cover up this internal political motive, unions developed a set of rationalizations for public consumption—and the public swallowed it.

What Lieberman does not tell us is that single-salary schedules became universal a decade-and-a-half before teacher unions achieved recognition or collective bargaining rights. In fact, it was not unions but management that brought about the change in the early post-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

World War II period. The reason? The baby boom. Millions of children were entering elementary school, but there weren't enough elementary school teachers. By going to a single-salary schedule, then, states could increase elementary school teachers' salaries without a comparable raise for high school teachers.

If Lieberman is right that single salary is a policy imposed and maintained by teacher unions, then why was it universally adopted before unions had any rights? Why has school management not made any attempts to change it? Fear, as Lieberman claims? Then why are school boards not also fearful of fighting teacher unions on other salary and working condition disputes, even to the point of taking strikes? And why is single salary universal even in those states where teachers are not much unionized and in which teacher collective bargaining is illegal?

Lieberman handles his presumably main point about teachers' pay with about equal rigor. First he tells us that "nobody knows" how much teachers are paid. In fact, there is little that is not known about this issue; the data on teachers are more comprehensive than the data on just about any other profession. Then he admits that there "is a wealth of data on the subject," but it is suspect because it is collected by teacher unions whose interest it is to portray teachers as underpaid. Teacher unions do indeed collect salary data, but their source is the states. Moreover, the most comprehensive survey of teacher salaries is conducted by the independent Educational Research Service, whose figures are actually a bit lower than the ones produced by the unions. Lieberman seems to be the only one in the dark on the subject of teacher salaries. Three different organizations —two teacher unions, an independent research service, not to mention 50 states and federal data collection—using different methods and having different interests all come up with the same number.

BUT BY FAR the most serious charge Lieberman makes is that "missing data would show significantly higher levels of compensation than those accepted by the reformers or the public generally. The relevant data are missing, it seems, precisely because they would weaken union claims that teachers are underpaid."

If Lieberman knows something that no one else does, he's certainly not telling. I searched his article for the "missing data" that would make his case, but in vain. (Do the unions perhaps have a secret data file? If so, it's a secret to me, too.) The closest I could come to missing data was no revelation at all: The fact that teachers enjoy fringe benefits and pensions in addition to their salaries is a matter of detailed public record. Since the value of these benefit packages is not ordinarily added to reports of teacher salaries, says Lieberman, the result is "significant understatements of teacher compensation."

Lieberman never does adjust teacher salaries to reflect fringes, which is odd, given the case he is trying to make. The real issue, of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

course, is not whether teachers get fringes or whether omitting their value underestimates teacher compensation; one can note that about any occupation or profession. The question is whether or not teachers enjoy greater benefits than comparable occupations.

Lieberman claims that they do, but can only sustain his argument by comparing teachers to "all workers outside of teaching." Even with this inappropriate comparison, the differences are slight. In 1983-4, contributions for teacher fringes averaged about 22 percent of salary as compared to 19 percent for all other workers. Lieberman produces no evidence that teachers fare better in benefits than other white-collar and professional employees, and distorts the rise in teacher fringes by failing to note that fringes rose faster than wages for most categories of workers; even the growth rate was no faster for teachers than for many other categories of workers.

Since Lieberman can't answer his own question, "are teachers underpaid?", his piece largely becomes an exercise in the fantasy land of comparable worth: an effort to determine teacher salaries by speculation about how they compare with others, about how many hours they work, about whether higher salaries attract greater talent and whether teacher talent is positively associated with student achievement. Each time the evidence does not fit his foregone conclusion, it is dismissed as union propaganda. Substantiating evidence from neutral sources is ignored (e.g., teachers' larger-than-average work week), while ignorance is pretended on issues that have been enlightened by empirical research (e.g., the role of increasing teacher compensation in attracting talented teachers, the relationship between academically able teachers and student achievement, among others).

WHEN THE WIND on the comparable worth tack dies down, Lieberman appeals to market forces. The idea is that if unions did not thwart the market, then teachers would be paid what they're worth, which would be even less than they earn today, save for a "meritorious" few. The problem is that there is no real market in teaching because there are no real standards. Even after all the fuss about minimum competency testing for new teachers, states routinely issue "temporary emergency" certificates to individuals who fail the test. Tens of thousands of teachers also are assigned to teach subjects in which they have no qualifications. The tests themselves are a poor excuse for standards. Requiring a score of at least 65 percent on a sixth-grade arithmetic exam—the cutoff score and level of a typical teacher competency test—means that the prospective teacher can get as many as one out of three items wrong and still be hired. Think of the impact on students! Think how much worse the teacher shortage would be if we had reasonable standards and no out-of-subject teacher assignments. And think of how highly teachers would be paid in a market that, unlike the one Lieberman concocts, respected standards.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Are unions responsible for this novel method of coping with teacher shortages? Are qualifications and standards abandoned in any other field when shortages exist? Lieberman, of course, would argue that anyone can teach, that unions' calls for standards are rationalizations, self-interested ploys to drive up salaries. But is Lieberman also prepared to argue that the next time we have a shortage of doctors or economists or beauticians, we should issue "temporary emergency" credentials, identify a few "meritorious" individuals and pay them a bit more, and hope for the best with the rest?

Of course, one need not even rehearse the facts to blemish Lieberman's sunny portrait of the lot of public school teachers. A few questions will do. For example, if teachers are doing so well, then why is there such a dire teacher shortage, even with low standards? Why do half of all teachers leave the ranks after only a few years? And why do the leavers, who presumably are not worth much, get paid significantly higher when they enter other occupations and work even fewer hours per week?

Finally, the best response to Lieberman is a story he told me in a different context some years ago. A dog food company brought together all of its department heads and consultants to make a presentation to the CEO. The dietician demonstrated the superior nutritional value of the dog food relative to other brands. The advertising department compared its campaign with the ads of all other dog food companies and showed the superiority of its efforts. The packaging department compared all the cans and labels and it was clear that none was better than its design. When all the presentations were over, the CEO asked, "If our product is superior in every way, then why are we doing so poorly?" A still, small voice was heard in the back: "Because the dogs won't eat it."

So Dr. Lieberman . . . why aren't all the bright college graduates killing each other to get in on the good deal you describe?

Albert Shanker is president of the American Federation of Teachers, AFL-CIO.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

A Reply

MYRON LIEBERMAN

ALTHOUGH it is not possible to point out all of Albert Shanker's misrepresentations, omissions, and *nonsequiturs* in this response, the following examples characterize his analysis as a whole.

According to Shanker, I devote "most of [my] article to arguing that 'the teacher unions are in the business to achieve more, not less, favorable terms and conditions of employment for teachers.'" This assertion is egregiously false; the entire article includes only one sentence on the subject. Inasmuch as readers can assess Shanker's assertion simply by reviewing the article, I invite—nay, urge—them to do so. Such action will illustrate as well as anything the fact that Shanker's comments ignore or misstate the main issues I have raised.

In the next two paragraphs, Shanker attributes to me the view that the elementary and secondary school salary policies I criticized "originated and are maintained solely because of the internal political needs of teacher unions and their leaders." Let me cite just one example to illustrate the blatant falsity of this statement.

One of the personnel policies criticized in my article is the absence of merit pay for teachers. On this issue, I wrote:

> Why, despite widespread public support for merit pay, does such a miniscule number of school districts provide it? One reason which is widely overlooked is that most school administrators do not want the task of identifying the teachers who are to receive merit pay. Such action inevitably generates intense scrutiny of administrative judgments. Inasmuch as most teachers do not receive merit pay, there will be many dissatisfied teachers ready to criticize every award; the typical administrator is likely to feel that he can do without this headache.
>
> On the other hand, since the concept has widespread public support, administrators need some other reason to explain its absence. Teacher unions meet this need. They are indeed opposed to merit pay, and hence their opposition provides an excuse which explains its absence while letting administrators off the hook.
>
> In fact, merit pay is about as rare where unions are weak and could not block it as where they are strong and able to do so. In most districts, union opposition to merit pay is simply an additional reason why it will not materialize.

So much for Shanker's assertion that I contend that wrongheaded policies "originated and are maintained *solely* because of the inter-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

nal political needs of teacher unions and their leaders (emphasis added)."

In discussing the origins of single-salary schedules, Shanker writes: "If Lieberman is right that single salary is a policy imposed and maintained by teacher unions, then why was it universally adopted before unions had any rights?"

Shanker's question clearly assumes that teacher unions had no rights before states enacted collective bargaining rights for teachers. In fact, state and local teacher organizations had the same rights to petition, lobby, and support political leaders and legislators that everyone else had; quite often, these organizations exercised considerable influence, amounting to *de facto* bargaining rights, long before the advent of teacher bargaining laws. For example, most of the state teacher tenure laws were enacted at the behest of state teacher associations before they enjoyed bargaining rights and before they were referred to as "unions," even though they exercised the functions of unions. As a matter of fact, the California Teachers Association successfully lobbied for state legislation mandating single-salary schedules before the enactment of teacher bargaining rights in California in 1975.

Even today, teacher unions are influential in several states (and school districts) which have not enacted bargaining laws. To imply, as Shanker does, that teacher unions had no rights at all before they had any bargaining rights is ludicrous. Even so, my argument is not that teacher unions are the sole cause of single-salary schedules; it is that their current support for them is (1) sufficient to block change toward a more rational salary policy, and (2) based upon reasons which are not publicly articulated (or even discussed candidly among teachers). Shanker's inaccurate historical argument does not lay a glove on this argument.

IN DISCUSSING teacher fringe benefits, my article pointed out that teacher compensation data, especially data emanating from teacher unions for public consumption, typically omits data on teacher fringe benefits. I did not allege that the information on fringe benefits is a secret. Instead, my point was that the information is not available to the public in a readily understandable and usable form; consequently, the unions can (and do) effectively understate the levels of teacher compensation. This point is valid regardless of the extent of the understatement, which varies according to the amount spent for fringe benefits.

This point is hardly assailable, and Shanker does not confront it directly. Instead, he asserts: "Lieberman never does adjust teacher salaries to reflect fringes, which is odd, given the case he is trying to make." On the contrary, it is not odd; it is a key point of the case I am trying to make. That is, I contend that in the vast majority of school districts in this country, citizens generally do not realize how

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

much teachers are paid partly because the cost of fringe benefits is not ordinarily or systematically included in discussions of teacher compensation. Thus Shanker's argument consists of charging me with failing to provide information which, as I have pointed out, is not readily available.

Theoretically, all the fringe benefits can be costed and added together to provide an accurate picture of total teacher compensation. In practice, this is rarely done. (In fact, teachers themselves often do not understand the total costs of their compensation package.) Although the basic data is not a secret, it is so diffused and fragmented that the overwhelming majority of citizens have little or no understanding of the teacher compensation picture as a whole. It is a fair criticism of school management that it has allowed this to happen, but the practice was established before fringe benefits assumed their current importance. Furthermore, school administrators usually enjoy the same fringe benefits as teachers, hence the administrators are not always eager to publicize the costs of these benefits.

For these and other reasons, teacher unions can successfully avoid discussions of total teacher compensation. The reason is not that the totals are a secret, in the sense that they exist somewhere in a file marked "Secret." The reason is that the totals typically do not exist at all—the interested parties have their own reasons for not computing or not publicizing them. Teacher unions do not need a detailed study to realize that an analysis of total compensation would weaken their argument for higher salaries. For this reason, they do not compute and/or do not publicize teacher compensation in these terms.

At any rate, does it matter whether teacher retirement and health benefits (to cite just two) typically exceed such benefits in the private sector? Not according to Shanker. He asserts: "The real issue, of course, is not whether teachers get fringes or whether omitting their value underestimates teacher compensation; one can note that about any occupation or profession. The question is whether or not teachers enjoy greater benefits than comparable occupations." Can anyone doubt that the reason Shanker tries to brush off the comparison is because it would tend to weaken the argument for higher salaries? If in fact teachers typically received less in fringe benefits, Shanker would undoubtedly be publicizing the fact to justify higher salaries for teachers. I did not and do not assert that the level of teacher fringe benefits is the only issue in teacher compensation, but it certainly is a "real" one, Shanker's metaphysics to the contrary notwithstanding.

Significantly, Shanker says nothing about the fact that teachers work substantially fewer days a year than most occupational groups. This difference (perhaps forty days a year on the average) alone reflects a substantial benefit which Shanker and teacher unions systematically ignore in salary comparisons to other occupations.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

TO ME, the most interesting issue raised by Shanker's letter are why he wrote it at all and what it signifies about the possibilities for educational reform. Let me conclude with a few observations on these matters.

Shanker is an interest group leader aspiring to a national constituency. For congressmen and governors, this situation poses a conflict between the interest of a limited geographical constituency (state or congressional district) and a broader, more diverse national constituency. In Shanker's case, however, the conflict is between the interests of his union constituency and the broader national constituency. Just as the governors and senators must be perceived as rising above regional interests (which are, of course, often surrogates for occupational interests), Shanker has the need to be perceived as rising above union interests.

For the most part, he has been very successful in this effort. With the broader constituency, he clucks all the buzz words of the so-called reform movement: higher standards, greater accountability, career ladders, financial incentives for better performance, and so on. With his union constituents, however, the emphasis is upon their local autonomy; Shanker's rhetorical dabbling with union heresy is not binding on them and they have nothing to fear from it. Aided and abetted by our gullible educational media and the widespread bankruptcy of our educational leadership generally, Shanker has maintained his control over the American Federation of Teachers (AFT) while achieving nationwide acclaim as an educational statesman and apostle of reform. At least on political grounds, his performance is indeed impressive.

His comments in this case, however, are party line union orthodoxy. They do not even acknowledge that elsewhere Shanker has expressed tacit support for, or agreement with, many of the points expressed in my article. For example, in other forums he has characterized efforts to raise the economic level of teachers generally as futile. Consequently, his comments are significant, not for what they say about his views on the issues but for clues as to his current latitude in dealing with reform issues. After reading his recital of union catechism, however, my conclusion is that even if Shanker understands what has to be done to improve education—which is an open question—his latitude to say or do anything constructive about it is severely limited by his role as AFT president.

Myron Lieberman is a professor in the Graduate School of Education at the University of Pennsylvania.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

CONTRIBUTORS

W. Robert Curtis is a lawyer and an associate professor of health services administration at the New School for Social Research. Dr. Curtis served as director of the Consent Decree Office for the state of New York during the Willowbrook State School litigation. He is the editor and publisher of the *New England Journal of Human Services.*

Winthrop Knowlton is Henry R. Luce Professor of Ethics, Business and Public Policy and director of the Center for Business and Government at Harvard University's Kennedy School of Government. His article is adapted from a chapter in *American Society: Public and Private Responsibilities*, Winthrop Knowlton and Richard Zeckhauser, eds., to be published by Ballinger.

Marc Landy is an associate professor of political science at Boston College and a lecturer in social science at the Harvard School of Public Health. He is co-author of a forthcoming book on the Environmental Protection Agency. He would like to acknowledge the help of Stephen Thomas of the Harvard School of Public Health.

Mark Lilla, associate editor of *The Public Interest*, is currently a fellow of the American Academy in Rome.

Thomas J. Main is a graduate student in the Harvard Kennedy School of Government. His article is adapted from a longer study to be published by the Twentieth Century Fund.

Peter D. Salins is chairman of the department of urban affairs at Hunter College of The City University of New York. His article is adapted from a chapter in *Housing America's Poor* to be published by the University of North Carolina Press.

Irving H. Welfeld is a senior analyst at the Department of Housing and Urban Development in Washington.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED